

# Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect

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*This Article considers discontent with liberal toleration as being both too empty, because it fails to secure respect and appreciation among citizens who tolerate each other, and too robust, because it precludes government from engaging in a formative project of helping citizens to live good, self-governing lives. To meet these criticisms, the Article advances a model of toleration as respect, as distinguished from a model of empty toleration, drawing on three rationales for toleration: the anti-compulsion rationale, the jurisdictional rationale, and the diversity rationale. It defends toleration as respect against some common criticisms—emanating from feminist, civic republican, and liberal perfectionist sources—of toleration’s supposed constraints upon a formative project. Toleration as respect not only permits but entails a formative project by government because it assigns a central value to the fostering of citizens’ capacities for democratic and personal self-government. The Article takes up internal feminist debates and the debate over same-sex marriage to raise prudential concerns about perfectionistic calls for government to steer citizens toward better ways of life and away from worse ones, and to argue for the comparative strength of a feminist variant of political liberalism. It also critiques the Supreme Court’s abortion jurisprudence as reflecting, at best, empty toleration, and rejects notions of empty toleration that justify discrimination against gay men and lesbians.*

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    The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a “bare . . . desire to harm” homosexuals . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.

    . . . . .  
    . . . Quite understandably, [this minority] devote[s] this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.

— Justice Antonin Scalia<sup>1</sup>

Liberal toleration implies critical distance; when I tolerate the actions of another, I leave him alone. A feminist politics built upon narrative can replace the critical distance of “empty tolerance” with empathetic understanding. This renewed feminist politics should demand more than our passive endurance of others’ differences; it should ask us to engage with others by actively seeking to understand those differences in a way that resonates with our own experience.

— Anne C. Dailey<sup>2</sup>

I. INTRODUCTION

A. *Empty Toleration or Toleration as Respect?*

    This Article takes up a series of questions about the relationship among toleration, autonomy, and governmental promotion of good lives. By these

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<sup>1</sup> *Romer v. Evans*, 116 S. Ct. 1620, 1629, 1634 (1996) (Scalia, J., dissenting).  
<sup>2</sup> Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265, 1283 (1993) (citing Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in FEMINIST LEGAL THEORY: READINGS IN LAW & GENDER 181, 197 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (referring to “empty tolerance”)).

terms, I intend to connote, respectively, the principle of restraint from coercive governmental action within a realm of individual liberty of belief and conduct, the concept of individual self-government or self-direction, and governmental action intended to persuade, encourage, or steer persons in the direction of particular ends, values, or decisions. Notwithstanding its venerable roots in liberal political theory and its translation into American jurisprudence, toleration remains a subject of considerable contestation and discontent. Discontent with liberal toleration often goes hand in hand with attraction to perfectionist conceptions of the responsibility of government as that of shaping or steering citizens pursuant to a vision of human virtue, goods, or excellence.

Liberal toleration elicits discontent both for being too empty (or thin), because it does too little, and for being too robust (or thick), because it does too much. These seemingly contradictory criticisms go to the attitude that toleration engenders in or requires of citizens, and to the limits that toleration places upon government's ability to engage in a "formative project" or "formative politics" of shaping citizens and helping them live good, self-governing lives.<sup>3</sup> Toleration is too empty, some critics charge, because it requires only that government leave persons alone with respect to certain beliefs or conduct, not that other citizens respect or appreciate those persons, their beliefs, or their conduct. Moreover, its justification is too thin because it rests on autonomy and choice, not on substantive moral discourse about human goods. The picture of toleration reflected in Justice Scalia's dissent in *Romer v. Evans* illustrates such emptiness: so long as government refrains from the use of the criminal law against a disfavored but tolerated minority (such as gay men and lesbians), it may express citizens' moral disapprobation of and hostility toward that minority's conduct through such means as the denial of civil rights.<sup>4</sup>

At the same time, some critics of liberal toleration charge that it is too robust because it affords persons too much freedom from government's pursuit of a formative project of promoting values and helping citizens live good, self-governing lives. Precisely because prominent liberal conceptions of toleration (in particular, the work of Ronald Dworkin and John Rawls) seek to go beyond empty toleration to respect, they lead to too restricted a conception of the

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<sup>3</sup> For the idea of a "formative politics" or "formative project," see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 6 (1996) (describing a republican "formative politics" as "a politics that cultivates in citizens the qualities of character self-government requires"). My joining of the terms "good" and "self-governing" aims to reflect the fact that, in their demands for a formative project, the perfectionists whom I consider in this Article generally define good lives in terms of the capacity for self-government.

<sup>4</sup> See *Romer*, 116 S. Ct. at 1634 (Scalia, J., dissenting); *supra* text accompanying note 1.

proper business of government. Instead, toleration should permit the government to pursue perfectionist goals, or even to advance an orthodoxy, so long as it refrains from coercion. The basic claim of a number of feminist, liberal, and civic republican perfectionist critics is that leaving persons alone is not sufficient to secure the capacities, qualities of character, or virtues necessary for self-government.

These opposing criticisms of toleration stem from competing conceptions of toleration, which I shall call "empty toleration" and "respect." The core component in the model of empty toleration is the principle of restraint from coercive governmental action within a sphere of individual liberty of belief or conduct. It does not require the tolerator to respect the person, beliefs, or conduct that are the subject of toleration, and it allows governmental action, short of coercion, aimed at steering that belief or conduct. The model of respect shares with empty toleration the core of restraint from coercion, but it aspires to the goal of respect, and even appreciation, among citizens who tolerate each other. It does not, as its critics often assume, bar government from seeking to influence tolerated thought and action by noncoercive means. However, a matter of some contention is what limits toleration as respect should place upon government when it seeks not simply to facilitate (i.e., to foster the capacities for self-government by measures that do not obviously steer or take sides) but to persuade, or to moralize (i.e., to use measures short of coercion with the intention of steering citizens toward certain values, choices, and behavior and away from protected though disfavored values, choices, and behavior).<sup>5</sup>

In this Article, I argue that a model of toleration as respect is the more attractive account of toleration as a matter of both political morality and constitutional interpretation. I argue that toleration as respect is not vulnerable to the charges directed at empty toleration. It aims to secure more than pale civility or grudging toleration by appealing to the protection of such goods as autonomy, moral independence, and diversity and through seeking to assure mutual respect and civility among citizens. In response to charges that toleration as respect is too robust, I argue that it does not serve as a prophylactic bar on government's pursuit of a formative project to foster citizens' capacities for self-government and to promote values. Rather, it insists upon reason-giving in the

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<sup>5</sup> Although some may argue that it is not possible to distinguish between facilitation and persuasion, I believe that such a distinction is comprehensible and useful. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991) (describing persuasion as attempting to induce action through a process of appealing to reason); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 948-50 (1996) (distinguishing education or information campaigns from persuasion, "understood as a self-conscious effort to alter attitudes and choices rather than simply to offer information").

deliberative process and upon careful scrutiny of the reasons for which government acts and of the ends it seeks to pursue. A model of toleration as respect is not only compatible with, but indeed entails, the idea that fostering citizens' capacities for self-government requires more than simply leaving persons alone. These capacities, or moral powers—the capacity for a conception of justice and the capacity for a conception of the good—correspond to self-government in the senses of democratic and personal self-government (or deliberative democracy and deliberative autonomy, respectively).<sup>6</sup>

My argument for a model of toleration as respect attempts to find and build upon common ground between liberalism and feminism on such key issues as the value of diversity and autonomy (or agency), factors constraining the development of autonomy, and the authority and responsibility of government to facilitate and promote the preconditions for autonomy. As such, toleration as respect represents a viable liberal feminist position. This argument defends toleration as respect against some of the common criticisms of toleration's supposed constraints upon a formative project, emanating from feminist, civic republican, and liberal perfectionist sources. I focus on these three lines of criticism because each defines the good lives that government should promote as self-governing lives, which suggests considerable common ground with a toleration as respect model. At the same time, I argue that there are hard questions about the promise and the peril of implementing a perfectionist project—whether feminist, civic republican, or liberal—in a morally pluralistic society. These questions also implicate the tension between the perfectionist project and the call to move beyond empty toleration.

### B. *Elaborating a Model of Toleration as Respect*

In Part II, I explore the concept of toleration and demonstrate how the instability within that concept itself leads to the competing models of empty toleration and respect, as well as to the criticisms of toleration as too thin and

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<sup>6</sup> I intend by the term *deliberative democracy* to refer to citizens applying "their capacity for a conception of justice to deliberating about the justice of basic institutions and social policies" and about the common good, and by *deliberative autonomy* to refer to citizens applying "their capacity for a conception of the good to deliberating about and deciding how to live their own lives." James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 2 (1995) (advancing a constitutional theory with the two themes of securing the basic liberties for deliberative democracy and deliberative autonomy). This two-fold idea of self-government draws upon John Rawls's political liberalism, which posits two moral powers—the capacity for a conception of justice and the capacity for a conception of the good. See JOHN RAWLS, *POLITICAL LIBERALISM* 19 (pap. ed. 1996).

too thick. I sketch the parameters of the model of toleration as respect. After canvassing prominent criticisms of toleration in liberal, feminist, and civic republican perfectionist work, I argue that toleration as respect can meet those criticisms.

In Parts III through V, to elaborate the model of toleration as respect, I distinguish and utilize three justifications for toleration: (1) the anti-compulsion rationale, that is, that compulsion or coercion corrupts belief or choice and violates autonomy; (2) the jurisdictional rationale, that is, that there is a realm of personal belief, choice, and conduct that it is not the proper "business" of government to regulate; and (3) the diversity rationale, that is, that it is inevitable that people freely exercising their moral powers will choose and pursue different ways of life and that achieving orthodoxy would require an objectionable level of governmental coercion. All three of these rationales have roots in John Locke's classic argument for religious toleration<sup>7</sup> as well as John Stuart Mill's famous argument for liberty of thought, conduct, and association,<sup>8</sup> and all find expression in contemporary American constitutional law and jurisprudence. I focus on toleration as it applies to a right to personal self-government, or deliberative autonomy, concerning such matters as intimate association, reproduction, and family.

The three justifications highlight the tension between the competing models of empty toleration and respect. I offer interpretations of these justifications that support toleration as respect over empty toleration. The anti-compulsion rationale potentially offers the strongest argument for confining toleration to empty toleration. A better reading of its requirements supports toleration as respect, but even if empty toleration satisfies those requirements, all three justifications taken together better support toleration as respect. I argue for an interpretation of the jurisdictional rationale that avoids certain misconceptions of toleration, leading, on the one hand, to the feminist charge that toleration entails an abdication of governmental responsibility to secure women's autonomy and well-being and, on the other, to the claim that toleration, by permitting governmental moralizing, relegates disfavored minorities (such as gay men and lesbians) to second-class citizenship. Finally, I argue that the diversity rationale, which rests upon both the fact and the value of reasonable moral pluralism, holds the greatest potential to move beyond empty toleration to respect.

I show that all three justifications for toleration are compatible with a facilitative role for government in fostering citizens' capacities for self-

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<sup>7</sup> See JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (Patrick Romanell ed., 1955) (1689).

<sup>8</sup> See JOHN STUART MILL, *ON LIBERTY* (David Spitz ed., 1975) (1859).

government and encouraging reflective decisionmaking in matters of deliberative autonomy. The greater point of controversy is whether a commitment to toleration as respect permits or precludes government to act by persuasive, rather than merely facilitative, means. I argue that toleration as respect comfortably supports governmental persuasion in certain cases, for example, when it furthers the ends of democratic self-government or promotes public values. The more difficult question is whether government should, as perfectionists urge, engage in the business of evaluating the merits of competing ways of life and steering citizens toward better or more valuable ways of life by such means as shaping preferences and social norms and encouraging certain choices over others. In Part V, I use the examples of the conflict over the morality of same-sex marriage as well as debates within feminism over what makes for a good life to highlight reasons for caution about the implementation of such a governmental project in a morally pluralistic society.

In Parts III and IV, I use a toleration as respect model to critique the Supreme Court's abortion jurisprudence. With respect to the selective funding cases, I contend that such jurisprudence fails to undertake the requisite scrutiny of the reasons for which government acts and of the impact of governmental regulation of abortion upon women's deliberative autonomy. In considering the Court's upholding of informed consent procedures aimed at persuading women against abortion, I show that its equation of such persuasion with facilitation of women's reproductive liberty is deeply problematic. While a toleration as respect model would support governmental measures to facilitate reflective decisionmaking, it would be cautious about endorsing the proposition that government facilitates such decisionmaking when it persuades in favor of one protected choice rather than another. I argue that the Court's abortion jurisprudence to date offers an unsatisfactory application of this proposition because the perfectionist message that government conveys rests on a problematic gender ideology about women's moral capacity and an inadequate model of women's reproductive well-being.

In Parts IV and V, I sketch the implications of a toleration as respect model for the battle over same-sex marriage. Although both proponents and opponents of same-sex marriage often contend that what is at stake is a move beyond toleration to respect, I argue that the model of toleration *as* respect has great potential to aid in securing full citizenship for gay men and lesbians. Similarly, I reject the model of empty toleration implicit in Scalia's dissent in *Romer v. Evans* and argue that toleration as respect supports a right to same-sex marriage. In particular, the jurisdictional and diversity rationales for toleration provide a strong foundation for powerful feminist, liberal, and gay rights



arguments that the ban on same-sex marriage enforces an unjust and intolerant gender orthodoxy.<sup>9</sup> Moreover, such arguments open the door to move beyond empty toleration to respect and appreciation by arguing that same-sex marriage may be a transformative model against which to criticize the institution of marriage.

The burden of this Article is to demonstrate that a toleration as respect model both offers more than empty toleration and affords ample room for a formative project. Such a model has considerable common ground with perfectionist critics of toleration, including the ideal of fostering citizens' capacities for self-government. By clarifying the contours of what such a model permits, and where and why it resists perfectionism, I seek to reduce the discontent with toleration and to suggest that, despite the allure of a perfectionist approach, a toleration as respect model holds more appeal for a morally pluralistic polity.

## II. THE ELUSIVE VIRTUE OF TOLERATION: EMPTY TOLERATION OR RESPECT?

Toleration is an "elusive virtue," even an unstable concept.<sup>10</sup> In this Part, I show how the instability in the concept of toleration leads to opposing criticisms of it and competing understandings of its relationship to autonomy and governmental promotion of good lives. I use the terms "empty toleration" and "respect" to distinguish two models of toleration, and contend that toleration as respect is the more attractive model and the better understanding. My focus will be on the two large questions raised at the beginning of this Article: What does toleration require of other citizens in terms of attitudes and engagement, and what limits does toleration place on government's ability to engage in a formative project of shaping citizens?

### A. *The Parameters of Toleration as Respect*

Tolerance, as contrasted with intolerance, rejects the use of force, or compulsion, to dictate or suppress certain beliefs, choices, and behaviors. In his classic essay, *A Letter Concerning Toleration*,<sup>11</sup> John Locke argued for

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<sup>9</sup> See *infra* Part V.B. For the idea of an unjust and intolerant gender orthodoxy, I draw particularly upon DAVID A.J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* (forthcoming 1998).

<sup>10</sup> TOLERATION: AN ELUSIVE VIRTUE (David Heyd ed., 1996).

<sup>11</sup> See LOCKE, *supra* note 7.

religious toleration. Contemporary liberal arguments for toleration trace it to the search for civil peace against the backdrop of the wars of religion in Europe.<sup>12</sup> These arguments generally extend toleration beyond religious beliefs to a broader principle of restraint from governmental coercion with respect to a range of decisions and conduct implicating persons' identities and comprehensive moral doctrines or ways of life, what I shall refer to as a realm of self-government, or deliberative autonomy. For example, a familiar formulation of the reason for permitting legal abortion is that, because abortion is a matter of conscience, it is for individual women, not the government, to decide.

The philosophical literature indicates that a common definition of toleration includes two elements: first, an impulse to use force because of disapproval of certain beliefs, choices, or conduct; and second, the decision, for reasons, to refrain from acting on that disapproval.<sup>13</sup> Thus, toleration simultaneously involves both "an impulse to intervene and regulate the lives of others" because of moral disapproval and "an imperative—either logical or moral—to restrain that impulse."<sup>14</sup> These two elements of toleration prefigure two basic criticisms of it.

The first, attitudinal component of toleration—the impulse to suppress because of moral disapproval, disgust, or simply discomfort—draws the criticism that toleration is empty or grudging and fails to require respect or appreciation among citizens. The second element—the decision to refrain from governmental intervention to regulate others' lives for reasons—elicits the criticism that toleration entails too expansive a view of the limits on government's authority to engage in a perfectionist formative project. But the model of toleration as respect can meet both of these charges.

### 1. *Toleration Need Not Be "Empty"*

Some scholars suggest that, by definition, respect for beliefs, choices, or conduct goes beyond toleration. Joseph Raz, for example, argues that to be tolerant is to refrain from taking coercive or punitive action that one believes one would be justified in taking and that toleration is "a distinctive moral virtue only if it curbs desires, inclinations and convictions which are thought by the

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<sup>12</sup> See, e.g., RAWLS, *supra* note 6, at xxvi–xxvii (locating the historical origin of political liberalism in the Reformation and its aftermath).

<sup>13</sup> See John Horton, *Toleration as a Virtue*, in TOLERATION: AN ELUSIVE VIRTUE, *supra* note 10, at 28, 28–35; JOSEPH RAZ, THE MORALITY OF FREEDOM 401–03 (1986).

<sup>14</sup> George P. Fletcher, *The Instability of Tolerance*, in TOLERATION: AN ELUSIVE VIRTUE, *supra* note 10, at 158, 158.

tolerant person to be in themselves desirable.”<sup>15</sup> On this view, if citizens simply decide “for reasons” to forbear from using governmental force against disapproved belief, choices, or conduct, they exhaust the requirements of toleration.

The call to move beyond toleration to respect and appreciation presupposes such an understanding of toleration and directly challenges the first element of the definition of toleration: the moral disapproval of another person’s beliefs or practices. The goal is to alter the negative valuation, to demonstrate the moral worth and human good of such beliefs or practices. As found in a range of prominent civic republican and feminist work, this criticism of toleration and call for something more has two features. The first is an argument that, because toleration simply requires that we leave each other alone, it fails to move citizens to engagement with, understanding of, and ultimately respect for each other.<sup>16</sup> Thus, feminist scholar Anne Dailey calls for a feminist reconstruction of “empty” liberal toleration, which implies “critical distance” and merely requires that we leave each other alone, into an “empathetic liberalism”: a “feminist politics” would “demand more than our passive endurance of others’ difference” and “ask us to engage with others by actively seeking to understand those differences in a way that resonates with our own experience.”<sup>17</sup> The call to move beyond empty toleration to respect and empathy reflects an aspiration also found in other critical and “outsider” work on transcending toleration: through such engagement, a formerly tolerated but marginalized ethnic or cultural minority would have the potential to transform citizens’ understandings of the tolerated “Other” and to transform the culture itself.<sup>18</sup>

Second, such critics argue that toleration is fragile, if not unattainable, when justified by autonomy rights or the value of choice alone and not through substantive moral discourse about the good of what is chosen. For example, civic republican scholar Michael Sandel contends that “it is by no means clear that social cooperation can be secured on the strength of autonomy rights alone, absent some measure of agreement on the moral permissibility of the practices

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<sup>15</sup> RAZ, *supra* note 13, at 401.

<sup>16</sup> See Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 71, 75–76 (1990) (discussing the contrast between Havelian liberalism and liberal legalism).

<sup>17</sup> Dailey, *supra* note 2, at 1283, 1285.

<sup>18</sup> See Adeno Addis, *On Human Diversity and the Limits of Toleration*, in ETHNICITY AND GROUP RIGHTS 112 (Ian Shapiro & Will Kymlicka eds., 1997); Larry Catá Backer, *Exposing the Perversions of Liberal Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 786–96 (1993).

at issue.”<sup>19</sup> He points to the Supreme Court’s failure to recognize a right to homosexual intimate association in *Bowers v. Hardwick*,<sup>20</sup> and faults the dissents for deploying autonomy arguments alone, rather than arguments about the good of homosexual intimate association. Even if autonomy arguments for rights succeed, Sandel argues, they forego the opportunity to move citizens beyond empty toleration of private, disfavored conduct and negative views about gay men and lesbians to respect and appreciation of them and the lives they live.<sup>21</sup> Sandel’s republican vision of rights would argue for rights based on the moral worth of the social practices they protect, as well as the contribution those practices make to republican self-government.<sup>22</sup>

It might seem that if citizens make this affirmative step from empty toleration to respect and appreciation, the impulse toward intolerance disappears and tolerance itself becomes unnecessary. Indeed, this illustrates the instability of toleration: there is a desire to resolve the concept of tolerance in the direction of either intolerance or respect (or even indifference which, like respect, would make toleration unnecessary).<sup>23</sup> To return to Sandel’s example, a stance of tolerating certain nonprocreative sexual conduct, despite moral objections, could move in the direction of intolerance if such conduct came to be viewed as so harmful to social order, sexual morality (or the moral fabric of society), and the institution of marriage as to be beyond the pale of toleration.<sup>24</sup> Conversely, this stance could move in the direction of respect if such conduct came to be viewed as morally permissible and thus the impulse to regulate it lost its justification and support. (Or, toleration could resolve itself in the direction of indifference, if society reached the point where it came to regard matters of sexual behavior as raising no questions of right and wrong, in which case there

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<sup>19</sup> SANDEL, *supra* note 3, at 106; *see also* West, *supra* note 16, at 44–47 (arguing that a responsibility-based justification for rights offers a more secure foundation).

<sup>20</sup> 478 U.S. 186 (1986).

<sup>21</sup> *See* SANDEL, *supra* note 3, at 103–08 (discussing *Bowers*).

<sup>22</sup> *See id.* at 25.

<sup>23</sup> *See* Fletcher, *supra* note 14, at 158–59. As Fletcher observes, from the perspective of the tolerated, tolerance is preferable to intolerance, but it is still less desirable than respect and acceptance. *See id.* at 170–71; *see also* Bernard Williams, *An Impossible Virtue?*, in *TOLERATION: AN ELUSIVE VIRTUE*, *supra* note 10, at 18, 20–21 (arguing that skepticism leads to resolving intolerance in the direction of indifference).

<sup>24</sup> As Lord Devlin noted, in the famous jurisprudential debate with H.L.A. Hart over decriminalizing sodomy, the limits of societal tolerance shift over time, raising the question of whether law should change to reflect such shifts. *See* PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 18 (1965); *see infra* note 180 for discussion.

also would no longer be any justification for intolerance.<sup>25</sup>)

We need not accept such a sharp distinction between toleration and respect. To be sure, at its most minimal, toleration may be nothing more than a prudential and “resigned acceptance of difference for the sake of peace,” *modus vivendi*, or agreement to disagree (e.g., religious toleration in the sixteenth and seventeenth centuries).<sup>26</sup> But it may also embrace a continuum of “more substantive acceptances of difference,” ranging from openness to others, to curiosity and a willingness to learn, to respect, and even to “enthusiastic endorsement of difference.”<sup>27</sup> For example, Rawls and Dworkin respectively make liberal arguments for toleration on the basis of “mutual respect” and “equal respect.”<sup>28</sup>

The model of toleration as respect does not require or guarantee that citizens move along the continuum from a grudging agreement to disagree toward respect or appreciation. Of course, at a minimum, in accepting a principle that government should refrain from using coercion, citizens implicitly afford other citizens some threshold level of respect, whatever their attitudes toward each other. However, governmental noninterference does not preclude citizens from harboring more positive attitudes toward, or from engaging with, each other.

Moreover, it is not clear that such positive attitudes are always desirable, and indeed attitudes closer to empty tolerance have a proper role in some circumstances. In some cases, citizens may accept the idea that government should not use coercion to suppress certain choices and conduct, but reasonably believe that permitted activity is morally objectionable or socially destructive and thus does not warrant respect and appreciation.<sup>29</sup> It is completely consistent with a strong defense of rights that citizens may voice to each other their views

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<sup>25</sup> See Williams, *supra* note 23, at 21.

<sup>26</sup> MICHAEL WALZER, ON TOLERATION 10 (1997).

<sup>27</sup> *Id.* at 11.

<sup>28</sup> See RAWLS, *supra* note 6, at 319; Ronald Dworkin, *Foundations of Liberal Equality*, in XI THE TANNER LECTURES ON HUMAN VALUES 1, 113–18 (Grethe B. Peterson ed., 1990).

<sup>29</sup> For example, government might tolerate smoking, but nonsmoking members of society might manifest their collective disapprobation of smoking through “raising their moral voice” by shunning, shaming, and criticizing smokers and cigarette manufacturers. See AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 23–53 (1993) (arguing that freedom from governmental interference does not mean freedom from the moral claims of the community; urging that communitarians should “raise the moral voice of the community” to encourage people to do the right thing); Suzanna Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963, 988–89 (1987) (arguing that the combination of official tolerance and societal intolerance allows for the creation of a virtuous citizenry).

concerning responsible exercise of those rights and may encourage each other to live good lives; for example, citizens may support a legal right to engage in hateful racist speech, or to produce or consume pornography, but argue vigorously that there are good reasons not to engage in such speech or conduct.<sup>30</sup> Only if we were to accept a justification of rights that so narrowed the scope of rights that "rights" equated with "rightness" (or goodness)—or that exercising a right was always the "right thing to do"<sup>31</sup>—would toleration automatically entail respect and appreciation. At the same time, as the debates over the regulation of hateful racist speech and pornography indicate, allowing room for a spectrum of attitudes also leaves room for citizens to argue for shifting the limits of tolerance in either direction as society evolves and reevaluates prior judgments about the personal and social impact of certain choices and behaviors.<sup>32</sup>

Thus, toleration as respect is not vulnerable to the charges lodged against empty toleration: it does not imply a "critical distance" between citizens or that, at best, citizens merely leave each other alone. One core justification for toleration is rooted in diversity: the minimal form of this argument simply entails recognition of the fact of diversity in a pluralistic society, but it leaves room for—while not requiring—a stronger form of the argument, entailing respect for and appreciation of diversity as a good. Toleration as respect is compatible with a feminist commitment to listening to the voices of women and other excluded "outsiders" and to critical engagement among citizens; indeed, Dailey argues that such a commitment can build on the valuable liberal principle of respect for diversity.<sup>33</sup>

Finally, with regard to the charge that toleration cannot be secured by an appeal to autonomy rights alone, toleration as respect treats autonomy as a good worthy of protection. Sandel overstates the dichotomy between the appeal to choice and to what is chosen. To invoke a familiar idea from constitutional argument, it is precisely because certain matters are so important or significant in persons' lives, and to their pursuit of moral goods, that we protect an "individual's right to make certain unusually important decisions that will affect

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<sup>30</sup> See Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1057–67 (1994); Sherry, *supra* note 29, at 986–89.

<sup>31</sup> In contrast to Sandel, some communitarians acknowledge the "gap" between legal rights and moral rightness and interpret it as calling for citizens to raise their moral voices to influence the exercise of legal rights. See ETZIONI, *supra* note 29, at 192–206, 263; William A. Galston, *Rights Do Not Equal Rightness*, 1 RESPONSIVE COMMUNITY 7, 8 (1991).

<sup>32</sup> See Fletcher, *supra* note 14, at 158 (suggesting that "[i]f pornography is harmful to women the way assault is harmful, there is no case for tolerance").

<sup>33</sup> See Dailey, *supra* note 2, at 1283–85.

his own, or his family's, destiny."<sup>34</sup> The justification for toleration as respect appeals to ideals such as moral independence, the allocation of a realm of decisional sovereignty—or autonomy—to persons rather than government, equal citizenship, and both the fact and value of diversity. Toleration as respect assumes that these ideals themselves reflect human goods that citizens can recognize as desirable; an appeal to the substantive moral worth of the beliefs or practices secured by rights would augment, rather than supplant, the appeal to these ideals.<sup>35</sup> Undeniably, a model of toleration as respect accepts that one consequence of protecting such ideals, as embodied in rights, is protecting some unwise, wrong, or morally unworthy choices. By doing so, this model offers the practical advantage that even when people disagree intractably about the substantive morality of particular choices, they may reach agreement upon a principle of toleration that allocates decisional authority to persons, rather than government. As discussed in Part V, in the context of arguments for same-sex marriage, this may be a considerable advantage; arguments that reject any principle of decisional autonomy lack such a default position in the face of moral conflict.

## 2. *Toleration as Respect Does Not Preclude a Formative Project*

Unlike the first criticism of toleration, which targets a definitional element of it, the second criticism addresses supposed liberal misunderstandings of the requirements of toleration. The charge is that toleration reflects a decision "for reasons" not to use force against disfavored ways of life but does not rule out milder forms of governmental action, such as education or persuasion. However, robust models of toleration, which conceive toleration as respect, wrongly preclude government from using such milder forms of action to further the goal of helping citizens live good, self-governing lives. In effect, the claim is that too thick a model of governmental restraint leads to too thin a conception of the proper business of government. Yet, some perfectionists contend, government's leaving citizens alone does not secure their autonomy in any meaningful sense, and it even imperils their ability to live good, self-governing lives.

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<sup>34</sup> *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) (citing *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719–20 (7th Cir. 1975)); see also Fleming, *supra* note 6, at 40–43 (describing deliberative autonomy as limited in scope to significant basic liberties).

<sup>35</sup> See Michael Moore, *Sandelian Antiliberalism*, 77 CAL. L. REV. 539, 550–51 (1989). For a critique of Sandel along the lines suggested in the text, see James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509, 530–38 (1997).

Although this criticism of liberal toleration emanates from many quarters, I focus here on three lines of perfectionist criticism: liberal, feminist, and civic republican. Unlike some antiliberal views, which would have government promote good lives in the sense of fostering a specific set of virtues or moral values, the perfectionists I have in mind define government's task in terms of its responsibility to foster the capacity for self-government, agency, or autonomy. For this reason, I contend, the formative project that they seek is, to a significant degree, compatible with a model of toleration as respect.

*a. Liberal Perfectionist Calls for a Formative Project*

The criticisms of antiperfectionist liberalism by Raz, who advances a "pluralistic perfectionist" liberalism, are illustrative.<sup>36</sup> He charges that antiperfectionist liberalism prophylactically (and wrongly) embraces governmental neutrality concerning ways of life, ruling out of bounds even noncoercive use of state power to steer and improve the lives of citizens. Here he targets Dworkin and Rawls, who have advanced conceptions of equal respect and mutual respect. Government, Dworkin once contended, does not treat citizens with equal concern and respect if it allocates resources based on views about the moral worth of different ways of life, or if it "prefers one conception [of the good life] to another" because it is more popular or officials believe it is superior.<sup>37</sup> As Dworkin once wrote, liberalism's political morality interprets equal respect to require "that government must be neutral on what might be called the question of the good life."<sup>38</sup> Raz contends that this liberal "neutrality" wrongly constrains government from pursuing perfectionist goals because it precludes government from engaging in noncoercive steering to help citizens make morally valuable choices.<sup>39</sup>

Raz rejects the view that "[r]espect for people as responsible moral agents" requires leaving them wholly free to make their own decisions, because such a

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<sup>36</sup> See RAZ, *supra* note 13. For other examples of perfectionist or "comprehensive" liberal political theory, which distinguishes itself from "political" or neutral liberalism, see WILLIAM A. GALSTON, *LIBERAL PURPOSES* (1991); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385 (1996).

<sup>37</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-73 (1977) (grounding requirement in a conception of persons as having the capacity to suffer pain and the capacity to form and act on a conception of the good).

<sup>38</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191-92 (1985). But Dworkin has abandoned this claim concerning the "heart" of liberalism in later work. See *id.* at 205-13; Dworkin, *supra* note 28, at 7 n.2.

<sup>39</sup> See RAZ, *supra* note 13, at 110-33.



view “disregards the dependence of people’s tastes and values on social forms, on conventions, and practices which are the result of human action.”<sup>40</sup> Thus, leaving persons alone does not equate with respecting their autonomy, but may undermine people’s ability to realize valuable conceptions of the good.<sup>41</sup> Raz also challenges Rawls’s project of political liberalism, which contends that it is possible to develop a political conception of justice, in order to establish fair terms of social cooperation among citizens on the basis of mutual respect and trust, without government embracing or attempting to secure agreement upon any comprehensive moral doctrine.<sup>42</sup>

Against such theories, Raz advances a pluralistic perfectionist liberalism. On his view, it is a proper function of government to promote morality, and personal autonomy, an essential ingredient of the good life, is a central moral principle that government should promote.<sup>43</sup> Government’s obligation to promote autonomy has two dimensions: (1) the government should “stand back and let people have the choice as to how to conduct their own lives”; and (2) “the government must take active steps, where needed, to ensure that people enjoy the basic capacities (physical and mental) and have the resources to avail themselves of an adequate range of options available in their society,” which also requires that government create an environment providing individuals with such options and the opportunities to choose them.<sup>44</sup> Government may properly

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<sup>40</sup> *Id.* at 426.

<sup>41</sup> *See id.* at 162. Drawing upon Raz’s idea of persons’ dependence upon social forms, Cass Sunstein would support government engaging in “norm management,” or seeking to change social norms and social meanings when they pose obstacles to autonomy and well-being. *See* Sunstein, *supra* note 5, at 908–10.

<sup>42</sup> *See* RAZ, *supra* note 13, at 124–33 (critiquing distinction between the right and the good and the reliance upon “neutrality” in JOHN RAWLS, *A THEORY OF JUSTICE* (1971) and in Rawls’s later work); Joseph P. Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3 (1990) (criticizing political liberalism for the idea that governments should be unconcerned with the truth or falsity of doctrines of justice). Rawls defines “comprehensive moral doctrine” as a moral conception that “includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct . . . .” RAWLS, *supra* note 6, at 13. One feature of Rawls’s distinction between a political, rather than comprehensive, conception of justice (and of liberalism) is the idea of the priority of right over the good, or that certain basic rights and liberties have priority, and that admissible comprehensive moral doctrines (or ideas of the good) must respect the limits of the political conception of justice. *See id.* at 173–76.

<sup>43</sup> *See* RAZ, *supra* note 13, at 418.

<sup>44</sup> Joseph Raz, *Liberty and Trust*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 113 (Robert P. George ed., 1996); *see* RAZ, *supra* note 13, at 418.

use coercive means such as economic redistribution to foster the conditions of autonomy, but toleration requires that government eschew the use of coercion to force persons to live good lives (where no harm to others is concerned), because coercion invades autonomy. However, it permits government to use noncoercive measures to encourage "acceptable and valuable projects and relationships" and to discourage "repugnant" or worthless ones.<sup>45</sup>

### *b. Feminist Perfectionist Calls for a Formative Project*

Some feminist perfectionists also reject neutrality and call for governmental responsibility to engage in a formative project. Some, like Raz, embrace autonomy as a core value that government should promote.<sup>46</sup> Others use the term "agency" rather than autonomy because they believe it focuses more directly upon such issues as women's and men's unequal power and resources and the problem of the effects of subordination upon women's capacity for self-government.<sup>47</sup> This choice of terminology reflects a narrow reading of liberal conceptions of autonomy as primarily focused on freedom from governmental constraint, or negative liberty, as well as the claim that liberal toleration, understood as leaving persons alone in the name of autonomy, does too little to secure women's actual capacity for meaningful self-government. My own reading of liberal conceptions of autonomy, upon which I draw for a model of toleration as respect, is that autonomy connotes *both* freedom from external constraint or coercion (e.g., noninterference by government) *and* the capacity for meaningful self-direction (which may require governmental action).<sup>48</sup>

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<sup>45</sup> See RAZ, *supra* note 13, at 417–18; see also GALSTON, *supra* note 36, at 222 (arguing that liberal toleration is consistent with education and persuasion concerning superior ways of life).

<sup>46</sup> See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 267–68 (1994); Kimberly A. Yuracko, *Toward Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism*, 6 UCLA WOMEN'S L.J. 1, 47–48 (1995).

<sup>47</sup> See Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1660 (1997); see also Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 346 (1995) (identifying the emergence of feminist models of "partial agency," which juxtapose women's "capacity for self-direction and resistance" with "often-internalized patriarchal constraint"). The distinction between agency and autonomy in text reflects conversations with Professors Tracy Higgins and Frank Michelman.

<sup>48</sup> See STEPHEN MACEDO, LIBERAL VIRTUES (1990); RAZ, *supra* note 13. For a discussion of this dual aspect of autonomy in the work of Dworkin and Rawls, see *infra* Parts IV.C.4 and V.A, respectively. Elsewhere I have addressed a different feminist critique of liberal conceptions of autonomy, i.e., that they are too atomistic because they fail to acknowledge the importance of relationships and connection. See Linda C. McClain,

In any event, a core feminist claim is that there is a gap between the ideal of the autonomous liberal self and the reality of women's lives, a gap left unbridged by government's merely leaving persons alone. Toleration contributes to this problem, the argument goes, in several ways. First, under the guise of a commitment to neutrality, liberal disavowal of a formative project of helping citizens live good lives thwarts the affirmative governmental help that women need.<sup>49</sup> Second, feminists such as Robin West charge that liberalism too narrowly focuses upon protecting the individual from governmental coercion, while the greater threats to women's agency and liberty stem from "private" power rather than state power.<sup>50</sup> Liberal toleration arguments fail to attend to the consequences of unequal power between women and men in the "private" sphere. Liberal defenses of autonomy assume that constitutional freedoms such as rights of privacy, intimate association, and freedom of expression protect the capacity for personal self-government, but feminists contend that these rights disempower women and impair their capacity for such self-government: too often, governmental noninterference in precisely those spheres "substitutes private for public power," leaving women subject to the private sovereignty of men.<sup>51</sup>

Third, these feminists claim that one consequence of living in a patriarchal society is that women have "inner" or internal constraints on their capacity for self-government, so that their very desires, preferences, and choices reflect patriarchal definitions of what a woman is and what she can be, as expressed through laws, customs, and social rules.<sup>52</sup> When liberal toleration, in the name of respecting diversity and autonomy, takes women's preferences and choices

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*"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992). For an influential example of this line of critique, see Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989).

<sup>49</sup> See Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1188-89 (1994).

<sup>50</sup> See WEST, *supra* note 46, at 114-21, 162-64; Higgins, *supra* note 47, at 1671-76.

<sup>51</sup> Rhode, *supra* note 49, at 1187-88; see also WEST, *supra* note 46, at 45-72 (arguing that Congress's failure to attack marital rape exemption under the Fourteenth Amendment subjects women to a private sovereign); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 453-57 (1992) (arguing that the Bill of Rights does more for men than for women and that its protections make it more difficult for women to develop as autonomous selves).

<sup>52</sup> See Nancy J. Hirschmann, *Toward A Feminist Theory of Freedom*, 24 POL. THEORY 46, 51-57 (1996); see also MacKinnon, *supra* note 2, at 162 (contending that male dominance is a "metaphysically nearly perfect" system, defining what a "woman" is by reference to subordination to men and men's needs).

as given and as reflecting their exercise of autonomy, it fails to consider that those preferences reflect the effects of sex inequality, social construction, and constraint (or, as Catharine MacKinnon put it, the effect of the male foot on women's throats).<sup>53</sup> As discussed in Part V, Susan Moller Okin's influential critique of Rawls charges that liberalism's commitment to toleration of diverse comprehensive moral doctrines conflicts with a feminist commitment to sex equality because it permits an unequal and unjust division of labor within the family that impairs women's capacity for self-government.<sup>54</sup>

How would such feminists reconceive the proper relationship among toleration, autonomy, and governmental promotion of good lives? One guiding principle appears to be that, rather than viewing state power as the greatest threat to autonomy, a feminist formative project would enlist government to secure the agency, autonomy, and selfhood of women.<sup>55</sup> Thus, feminists reject governmental neutrality to the extent it masks the fact that particular laws serve patriarchal interests and disadvantage women and other groups with less power; instead, they urge an antisubordination or anticaste analysis that recognizes that securing self-government and equality for such groups may require redistribution of power and resources.<sup>56</sup> For example, West advocates a "progressive constitutionalism," whereby legislators have an obligation under the Fourteenth Amendment to attack "hierarchies of class, gender, or race" and forms of illegitimate social power constraining the ability of women, racial minorities, and gay men and lesbians to live "meaningfully autonomous

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<sup>53</sup> See CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 44-45 (1987).

<sup>54</sup> See SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 103-04 (1989) (critiquing RAWLS, *supra* note 42); Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 ETHICS 23 (1994) (critiquing RAWLS, *supra* note 6).

<sup>55</sup> See SEYLA BENHABIB, SITUATING THE SELF 214 (1992); Higgins, *supra* note 47, at 1701-03; Yuracko, *supra* note 46, at 31-48. In commenting on this Article, Professor Sally Goldfarb suggested that one simple test for appropriate governmental action might be distinguishing governmental coercion that advances feminist goals from governmental coercion that does not.

<sup>56</sup> See, e.g., CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Hirschmann, *supra* note 52, at 59; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986). Feminists also argue that formal equality does not yield substantive equality. Some feminists, such as Martha Fineman, argue against equality—understood as gender neutrality—as a goal and urge alternative approaches focused upon the "unequal 'reality' of many women's lives." MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 175 (1991).

lives.”<sup>57</sup> Recognizing that women’s preferences may reflect internal constraints and adaptation to inequality, some feminist perfectionists advocate a role for government in reshaping social norms and women’s preferences to advance gender equality.<sup>58</sup> Just how these feminist perfectionists would implement this formative project, and what role toleration would play, are vexing questions, to which I return in Part V.

### c. Civic Republicanism’s Formative Project

Sandel argues that our democracy is engulfed by discontent because our public philosophy—“the political theory implicit in our practice, the assumptions about citizenship and freedom that inform our public life”—rests upon a liberal political theory that is impoverished and inadequate to the challenges of self-government.<sup>59</sup> For liberalism, freedom consists of the capacity to choose our ends. Accordingly, government should be neutral toward the moral and religious views that citizens espouse, take existing preferences as given, and, pursuant to liberal toleration, merely provide a framework of rights within which citizens may pursue the ends and values that they choose. Sandel contends that the liberal conception of freedom (rooted in the “minimalist liberalism” that he ascribes to Rawls and the neutrality that he attributes to Dworkin) is attractive as a response to the circumstances of moral pluralism, but flawed, because it gives up and rules out too much—the republican formative project and ideal of self-government.<sup>60</sup>

By contrast, within the civic republican strand of the American constitutional and political tradition, to be free is to be capable of sharing in self-government, which involves “deliberating with fellow citizens about the common good and helping to shape the destiny of the political community.”<sup>61</sup> Because self-government requires certain qualities of character, or civic virtues, government cannot be neutral but must engage in a formative project to cultivate such qualities.<sup>62</sup> Sandel distances himself from the substance of classical republicanism, with its exclusiveness, coerciveness, and inegalitarianism, and calls for a pluralistic republicanism in a diverse and

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<sup>57</sup> WEST, *supra* note 46, at 275.

<sup>58</sup> See Higgins, *supra* note 47, at 1694–1701.

<sup>59</sup> SANDEL, *supra* note 3, at 4–7.

<sup>60</sup> See *id.* at 4–7, 17–24; Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 FORDHAM L. REV. 1, 2–20 (1997).

<sup>61</sup> See SANDEL, *supra* note 3, at 5.

<sup>62</sup> See *id.* at 4–7.

mobile society, one that need not have a unitary and uncontested conception of the common good. Moving beyond the encumbered self (with which he contrasted the liberal "unencumbered self" in his earlier work), he advocates a republicanism that can accommodate "multiply-situated selves" with conflicting loyalties and obligations.<sup>63</sup> It is clear that such a pluralistic republicanism would embrace a commitment to a process of deliberation concerning goods and moral ideals. It is less clear, however, what the substance of such a pluralistic republicanism's formative project would be and what goods or virtues it would foster.<sup>64</sup>

### B. *Toleration as Respect and a Formative Project: Interpretive Dilemmas*

Perfectionist criticisms of liberal toleration for unduly constraining government's formative project focus upon what, in common definitions of toleration, are unanswered questions: If toleration requires that government refrain from force with respect to certain matters of belief, choices, and conduct in pursuing perfectionist ends, does it similarly require that government refrain from measures short of force to pursue the same ends? Do the arguments for refraining from force apply to noncoercive measures such as persuasion or facilitation? And, if not, what distinguishes coercion from such measures? Does toleration require that government not only refrain from imposing an orthodoxy by force, but also refrain from having an orthodoxy at all? And, if not, does toleration impose any limits upon the reasons for which government may act, that is, upon the ends or human goods that government may advance?

In Parts III-V, I address these questions by focusing on three justifications for toleration and their import for a model of toleration as respect: the anti-compulsion rationale, the jurisdictional rationale, and the diversity rationale. I concentrate on these three because they best reflect contemporary understandings of toleration, as applied to liberties associated with deliberative autonomy, and best focus the debates over perfectionism.<sup>65</sup> To preview the

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<sup>63</sup> See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 21 (1982); SANDEL, *supra* note 3, at 318-21.

<sup>64</sup> Elsewhere I argue that Sandel fails to deliver the substantive goods for such a republicanism. See Fleming & McClain, *supra* note 35 (reviewing SANDEL, *supra* note 3).

<sup>65</sup> Undoubtedly, some mixture of justifications, attentive to context, rather than one overarching justification, offers the best grounding for toleration. The range of justifications for freedom of speech is illustrative. For example, one prominent argument for freedom of speech stresses the value of toleration for the tolerator: tolerating extremist speech helps to develop the more general capacity for the exercise of toleration, or self-restraint. See LEE C.

argument, all three justifications support the proposition that toleration requires that government not force or coerce belief or conduct. I defend toleration as a necessary condition for fostering citizens' ability to live good, self-governing lives, but share the perfectionist assumption that the governmental noninterference required by toleration may not be sufficient to secure such self-government. Toleration as respect permits, indeed entails, a certain sort of formative project. Accordingly, toleration as respect is not a prophylactic bar on all use of governmental coercion or regulation of private life, and thus does not lead to governmental abdication of responsibility to protect persons from abuses of power in the private sphere. Nor does toleration as respect impose a categorical bar on governmental persuasion, or moralizing; for it recognizes that in a modern regulatory state, which routinely undertakes to educate, inform, and persuade citizens, government properly acts for many reasons and will use a range of measures to do so.<sup>66</sup> Instead, it requires an inquiry as to the reasons for which government seeks to employ measures such as persuasion and the ends it seeks to foster, as well as the likely effect such persuasion would have on the capacity for self-government. As I will illustrate with the example of abortion jurisprudence, toleration as respect would favorably distinguish, on the one hand, government acting to further the capacity for self-government through encouraging reflective decisionmaking and, on the other, government steering in favor of a sectarian orthodoxy or contested view of the good life.

In recognizing that government has the responsibility to foster self-government, and in leaving some room for governmental persuasion to achieve that end, this model of toleration as respect draws upon the liberal accounts of Rawls and Dworkin—which allow more room for a formative project than perfectionist critics grant—and seeks points of convergence with perfectionist accounts (particularly, feminist perfectionism). As such, toleration as respect represents a viable liberal feminist position, one that argues for the comparative strength of a feminist variant of political liberalism over a more perfectionist position. Despite the allure of perfectionism, I suggest that a toleration as respect model should be cautious about embracing its call for government evaluating and preferring some lives over others and seeking to perfect persons'

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BOLLINGER, *THE TOLERANT SOCIETY* 33–35 (1986). The other major justifications emphasize democratic self-government, see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993), or autonomy, see C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989). There are also important arguments based on the marketplace of ideas and worries about the slippery slope when government acts as censor. See Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap*, 81 *IOWA L. REV.* 883 (1996).

<sup>66</sup> For a helpful treatment of government expression in a democracy, see MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

lives by altering their preferences, particularly in light of such prudential concerns as whose perfectionism will supply the content of government's project and how a deliberative democracy will resolve conflicts over what it means to live a good, self-governing life.

### III. THE ANTI-COMPULSION RATIONALE FOR TOLERATION

The anti-compulsion rationale for toleration reflects the familiar view that toleration protects against the evil of forced beliefs and conduct. As shown above, definitions of toleration generally have at their core refraining from governmental compulsion. In Locke's classic argument for religious toleration, a central justification for the rejection of force is that "true and saving religion" is the inward persuasion of the mind; it is "the nature of the understanding," he contended, that "it cannot be compelled to the belief of anything by outward force."<sup>67</sup> Accordingly, the proper tools of religious conversion are not fire and sword, but those of persuasion and example.<sup>68</sup> Locke argued that matters of religion should be left to the free exercise of conscience and the powers of reasoning, a vital root for the contemporary principle of respect for liberty of conscience and the assumption that persons should be permitted the free exercise of their moral powers. In *Planned Parenthood v. Casey*, the joint opinion articulates the anti-compulsion rationale thus: "beliefs" about such matters as "one's own concept of existence, of meaning, of the universe, of the mystery of human life . . . could not define the attributes of personhood were they formed under compulsion of the state."<sup>69</sup> Similarly, Dworkin echoes classic defenses of toleration in stressing that compelled beliefs or conduct lack moral worth. As he puts it, no one's life can be improved against the grain of one's "most profound ethical conviction" that it has not been.<sup>70</sup>

The anti-compulsion rationale appears to rest upon a model of personhood according to which forcing or dictating what persons shall think, believe, or do

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<sup>67</sup> LOCKE, *supra* note 7, at 18.

<sup>68</sup> *See id.* at 18–19, 26.

<sup>69</sup> 505 U.S. 833, 851 (1992).

<sup>70</sup> Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 486 (1989); *see* Dworkin, *supra* note 28, at 116–17. In contrast, contemporary defenders of traditional morals laws make the paternalistic argument that such laws help persons who would otherwise engage in immoral conduct by seeking to prevent a "crucially important species of harm": exposure to the "corrupting influences of various forms of vice." ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 169 (1993). But George also acknowledges that there are prudential arguments that may temper this use of criminal law. *See id.* at 43–44, 167.



distorts and corrupts belief formation and self-definition. In his famous argument for liberty of thought, conduct, and association, Mill argued against the use of force in matters not implicating society's need for self-protection (i.e., not causing harm to others) by reference to what H.L.A. Hart has called "a specific conception of the human person and of what is needed for the exercise and development of distinctive human powers."<sup>71</sup> Mill appealed to the "interests of man as a progressive being" and contended that "[t]he only freedom which deserves the name, is that of pursuing our own good in our own way" (subject to the harm principle), and that "[m]ankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest."<sup>72</sup> So understood, the anti-compulsion rationale rests upon a normative principle of an entitlement to freedom of conscience, and in turn, moral independence or autonomy, rooted in respect for persons' moral powers. A model of toleration as respect embraces this normative principle.

However, some scholars resist finding any such normative principle in the anti-compulsion rationale. They argue that Locke's argument against intolerance did not rest on its violation of a right to moral independence or of any other rights of the tolerated.<sup>73</sup> Instead, Locke's objection to government's use of force was the prudential one that force was an irrational means to pursue the end of religious orthodoxy: belief cannot be forced, precisely because it is not the product of the will, or of choice, but of the dictates of conscience.<sup>74</sup> Thus, if the anti-compulsion argument is confined to a point about irrationality, it only restrains government from using means that do not promise to achieve its ends. If government could use force to secure orthodoxy, then it would no longer be irrational to attempt to do so; and if measures short of force do not distort belief, they are not irrational.<sup>75</sup>

Confining Locke's point to the irrationality of compulsion is problematic because it isolates the anti-compulsion argument from another strong premise in his theory, which I call the jurisdictional argument: a person's religious salvation is his or her own affair, and not the proper business of government.

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<sup>71</sup> H.L.A. HART, *Introduction*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 1, 17 (1983).

<sup>72</sup> MILL, *supra* note 8, at 12, 14.

<sup>73</sup> See SUSAN MENDUS, *TOLERATION AND THE LIMITS OF LIBERALISM* 22-43 (1989).

<sup>74</sup> See *id.*; JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* 50 (1996).

<sup>75</sup> See Jeremy Waldron, *Locke, Toleration and the Rationality of Persecution*, in *JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES* 61, 67-81 (Susan Mendus ed., 1988).

Thus, it seems reasonable to infer from Locke's theory some notion of an entitlement to seek, free of governmental force, one's own salvation, pursuant to the dictates of conscience (whether or not this is identical to contemporary conceptions of a right to autonomy). Moreover, the argument that Locke regarded religious belief as having nothing to do with choice is undercut by the fact that he spoke of true religion as inner persuasion and contemplated that people could be led to religious truth through persuasion and exhortation.<sup>76</sup> In contemporary society (no doubt more than in Locke's times), people can and do, in a meaningful sense, "choose" their religion.<sup>77</sup>

I believe that the better account of the anti-compulsion rationale, as it functions in contemporary arguments for toleration, is that it reflects both a normative principle of respect for autonomy and a prudential rule about means and ends. Raz, for example, identifies the evil of coercion in its invasion of and insult to autonomy. Coercion occurs, and thus a person is not autonomous, he argues, when a person is forced to act against his or her will, subject to the domination of the will of another.<sup>78</sup>

### *A. Distinguishing Compulsion from Persuasion*

If the core evil that toleration avoids is compulsion, may government use means short of compulsion to promote beliefs, choices, or conduct and thus "take sides" about morality or the good life? Or must government refrain from any attempt to regulate or influence with respect to those matters? If the anti-compulsion rationale rests on a normative entitlement of freedom of conscience, rooted in a conception of personhood, what does honoring that entitlement entail: that the individual be left alone or simply that she not be compelled? Does it also entail freedom from persuasion? The short answer is that the anti-compulsion rationale leaves open the question of the permissibility of governmental persuasion.

Locke's anti-compulsion rationale appears to be consistent with a permissible role for governmental persuasion. Locke argued that one's salvation is one's own affair, but he also emphasized that the proper tools by which to

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<sup>76</sup> See LOCKE, *supra* note 7, at 16, 18–19, 34–35.

<sup>77</sup> See, e.g., Stephen J. Dubner, *Choosing My Religion*, N.Y. TIMES, Mar. 31, 1996, § 6 (Magazine); Cathy Myrowitz, *Converted for Life*, BALTIMORE JEWISH TIMES, Jan. 31, 1997, at 10. But even if one resists the idea of autonomy because it fails to take into account either the extent to which obligations and attachments claim us and define us, one can endorse the idea that compulsion harms the pursuit of a good life. See GARVEY, *supra* note 74, at 49–57.

<sup>78</sup> See RAZ, *supra* note 13, at 148–57.

secure salvation are those of persuasion, not compulsion. He contended that, as any other man may do, the civil authority may use "teaching, instructing, and redressing the erroneous by reason" to attempt to draw the heterodox into the way of truth and salvation; "but it is one thing to persuade, another to command; one thing to press with arguments, another with penalties."<sup>79</sup> Thus, Locke appears to say that noncoercive measures by government to secure salvation are consistent with toleration.

Mill also distinguished force from persuasion, envisioning a range of noncoercive measures available to "society," including persuasion, to signal disapproval of certain choices and behaviors and to encourage better ones.<sup>80</sup> However, whether Mill approved of such measures when undertaken by government is less clear. He often distinguishes sharply between acts of "society" and acts of government, but at other times appears to treat the two as synonymous. Moreover, his fears of "social tyranny" in matters of thought and opinion as a greater threat to liberty than political oppression raise questions both as to whether he supported concerted or collective rather than individual attempts at persuasion and as to how to draw the line between compulsion and persuasion.<sup>81</sup>

Thus, the anti-compulsion rationale supports the proposition that government should refrain from compulsion in certain matters of belief, choice, and conduct, and seems to support the inference that government may use measures short of compulsion to shape such belief, choice, and conduct. The basis for this inference is that the evil of intolerance is the corruption of belief due to compulsion, but noncoercive governmental action to steer belief does not commit that evil. Thus, persuasion is not irrational.

To the extent the anti-compulsion rationale rests on an entitlement to freedom of conscience or autonomy, the assumption is that persuasion, unlike compulsion, fosters rather than hinders the exercise of that freedom. Indeed, on Locke's and Mill's accounts, a commitment to freedom of conscience appears to entail persuasion in the direction of orthodoxy ("true religion" or right belief) or of better ways of life as an important element in shaping the exercise of such freedom. This interpretation of the anti-compulsion rationale suggests that governmental persuasion in matters of personal self-government is compatible with respect for moral powers and the requirements of personhood if and only

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<sup>79</sup> LOCKE, *supra* note 7, at 18–19.

<sup>80</sup> See MILL, *supra* note 8, at 11, 71.

<sup>81</sup> See *id.* at 6–7, 14–15. Mill also states that, in faults concerning only himself, a person should suffer only the "natural," "spontaneous consequences" of those faults, e.g., other persons' unfavorable opinions and avoidance of him. *Id.* at 72–73 (emphasis added).

if it fosters such self-government. For example, Raz's contemporary account of toleration holds that respecting autonomy requires that government's perfectionist policies must refrain from compulsion but may use persuasion and steering because the latter do not invade or "insult" a person's autonomy but, to the contrary, are necessary to foster citizens' living good (autonomous) lives.<sup>82</sup> He argues that the autonomy principle "permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones," through such means as subsidizing certain activities, rewarding their pursuit, and discouraging the pursuit of other ends.<sup>83</sup> (Although his perfectionist goal is republican self-government rather than liberal autonomy, Sandel similarly argues that government's formative project need not be coercive, but may involve a "gentler kind of tutelage" such as persuasion.<sup>84</sup>)

### B. Three Questions About Governmental Persuasion

To the extent that the anti-compulsion rationale permits governmental persuasion, at least in the service of self-government, should a model of toleration as respect embrace such persuasion? To answer this question, it is necessary to address three questions, which I raise at the outset and then explore in the context of abortion jurisprudence. First, how are we to distinguish governmental coercion from persuasion, or moralizing? Second, even if governmental persuasion in matters of personal self-government is not coercive, is it inconsistent with toleration as respect because it insults notions of personhood, human dignity, and moral capacity when government undertakes to do our moral thinking for us?<sup>85</sup> Third, if the anti-compulsion rationale forbids government from using force to impose or dictate an orthodoxy, does it suggest any limits upon government using persuasion in the service of such an

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<sup>82</sup> See RAZ, *supra* note 13, at 161, 407–20.

<sup>83</sup> *Id.* at 417–18.

<sup>84</sup> SANDEL, *supra* note 3, at 319–20. In this regard, it is puzzling that Sandel points to the Supreme Court's striking down of a compulsory flag salute in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *see infra* notes 102–05 and accompanying text, as a fateful turn away from the republican formative project toward the liberal "procedural republic" of choice and fundamental rights. SANDEL, *supra* note 3, at 54–55. Is a school flag salute special because it involves the education of children (as opposed to adults), or is compulsion a vital component of the republican project? *But see* Sandel, *supra* note 60, at 16–17 (discussing *Barnette* and stating that: "I'm not that enthusiastic about compulsory flag salutes. I don't think they're very effective, given the purpose").

<sup>85</sup> See Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1149–52 (1989).

orthodoxy? In other words, does a normative principle of respect for autonomy and moral powers imply any limiting principles concerning the reasons for which government may act, even when it eschews direct coercion?

### 1. *Distinguishing Coercion from Persuasion When Government Speaks*

It is not possible to offer any bright-line or categorical distinction between governmental compulsion and persuasion. Between the most obvious cases of compulsion (a gun to the head) and persuasion (changing one's mind in response to a good argument) lie many examples raising concerns about subtle or indirect coercion.<sup>86</sup> Raz suggests that what distinguishes coercive threats from offers is that threats "reduce the options available to the person to whom they are addressed," and thus are likely to "change a person's situation significantly for the worse"; by contrast, offers "never worsen and often improve" a person's options.<sup>87</sup>

One complicating factor is that, as liberals often argue, because the state has a monopoly upon the legitimate use of coercive power and its "ability to undertake any activity at all rests on its coercive power," the coercive power of the state "stands in the background even when it is not overtly deployed."<sup>88</sup> Scholarship on the topic of "when government speaks" also suggests the difficulty of finding a formal line between governmental coercion and persuasion, or government speech that denies citizens' autonomy and that

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<sup>86</sup> Thanks to Professor Abner Greene for these examples. The same linedrawing problem may arise with facilitation and persuasion. One might argue that government cannot really act in a "neutral" manner, but always acts to further certain ends, and thus to steer citizens or modify their behavior in some way. For example, does President Clinton's advocacy of the v-chip serve to facilitate people's capacity to exercise their own preferences more perfectly (i.e., it helps parents to prevent their children from viewing violent representations on television that the parents regard as objectionable)? Or does it represent an act of moralizing, by which government, in signalling disapproval of sex and violence on television and the need to shield children from it, seeks to persuade (and even subtly coerce) parents toward consensus with this view? Thanks to my colleagues Norm Silber and Marshall Tracht for this example.

<sup>87</sup> RAZ, *supra* note 13, at 150. Although Raz and some other perfectionists give selective governmental subsidies of favored activity as an example of permissible noncoercive steering that, presumably, does not violate this distinction between threat and offer, *see id.* at 161, 417, Sunstein, *supra* note 5, at 950, I will argue that government's selective funding of childbirth and not abortion may blur that distinction.

<sup>88</sup> Waldron, *supra* note 85, at 1140–43; *see also* Gardbaum, *supra* note 36, at 398 (suggesting caution in granting state broad interventionist mandate).

which enhances it.<sup>89</sup> Attempts to find some limiting principle for governmental speech, such as treating citizens with equal respect or fostering citizens' capacity for self-direction, reflect a striking parallel to the debate over the implications of the anti-compulsion rationale—they share the premise that what should distinguish persuasion from coercion is its role in aiding self-government.<sup>90</sup> My point here is not to claim that governmental persuasion is inherently coercive, but to suggest some reasons for resisting the assumption that it is obviously noncoercive. In light of these concerns, a toleration as respect model would focus not so much on linedrawing between persuasion and compulsion as on the reasons for which government acts.

## 2. *Promotion of Governmental Orthodoxy and Moral "Insult"*

Toleration constrains only coercion undertaken for certain reasons and with certain ends in mind; it is not a complete bar on the use of coercive power. Toleration bars using the coercive power of government to advance "sectarian" views or orthodoxies about the good, as contrasted with acting to pursue general goods or the public welfare.<sup>91</sup> To use Locke's often-cited example, government may not ban animal sacrifice as an element of religion; however, it could ban the killing and burning of animals for "civil" or public-regarding reasons, such as a dangerous shortage of cattle.<sup>92</sup> But should toleration similarly constrain government from acting for "sectarian" purposes or to promote an orthodoxy if it does not employ force?

Some proponents of liberal neutrality and equal respect respond that the answer should be yes, particularly when government seeks to go beyond facilitating the capacity for self-government to "consider what is good and valuable in life and what is ignoble and depraved when drafting the laws and

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<sup>89</sup> YUDOF, *supra* note 66, at 34 (noting that difficulty is due in part to determining the impact of such factors as the intensity of the speech, its efficacy, and the countervailing effects of other "messages" from nongovernmental sources).

<sup>90</sup> See *id.* Evaluating when it may be appropriate and desirable for particular branches of government to act in a persuasive manner may also require working out a conception of institutional roles and responsibilities. That project is beyond the scope of this Article.

<sup>91</sup> See DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 242–54 (1986) (advancing theory of constitutional privacy rooted in primacy of religious toleration).

<sup>92</sup> LOCKE, *supra* note 7, at 39–40. A contemporary example of this sorting out of motives may be seen in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which the Supreme Court struck down a ban on killing animals even for religious purposes, ostensibly enacted for public health reasons, but which in effect targeted the religious practices of the Santeria religion.

setting the framework for social and personal relationships.”<sup>93</sup> In criticizing Raz’s call for governmental steering in favor of morally worthy ways of life and choices, liberal philosopher Jeremy Waldron argues that Raz gives inadequate attention to the “insult” involved when “government actually takes it upon itself to think about such matters in the first place.”<sup>94</sup> Waldron’s objection to governmental perfectionism reflects a view that equal respect for persons’ moral powers requires that government not even seek to steer the exercise of those powers.

As an initial matter, it is doubtful that the anti-compulsion rationale, taken in isolation, supports Waldron’s argument. Resolving the question of the extent to which toleration as respect requires an entitlement to be free from any governmental steering concerning the exercise of deliberative autonomy requires a consideration of how best to understand autonomy, which implicates consideration of the requirements of the jurisdictional and diversity arguments for toleration (to which I turn in Parts IV and V). We have seen that common interpretations of the anti-compulsion rationale assume, contra Waldron, that persuasion is compatible with respect for moral powers and autonomy. Raz, for example, defends such persuasion and contends that the intuitive appeal of anti-perfectionism or neutrality rests on the confused (and erroneous) idea that such a stance is necessary to prevent people from imposing their ways of life on others.<sup>95</sup> Additionally, proponents of governmental promotion of an orthodoxy argue that just as Lockean toleration did not preclude government from having a preferred view or orthodoxy, but simply from using force to promote it, so should contemporary principles of toleration allow for noncoercive governmental promotion of an orthodoxy.<sup>96</sup> To the extent such proponents interpret Lockean toleration as rooted in the irrationality of compulsion, not any entitlement to autonomy, they would find a bar on persuasion even less convincing. While there may be, they concede, prudential reasons for tolerating immoral and bad choices and behaviors, if autonomy is not a sufficient justification for governmental restraint from compulsion, then, *a fortiori*, it does not afford a reason for government to refrain from moralizing to help people

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<sup>93</sup> Waldron, *supra* note 85, at 1102.

<sup>94</sup> *Id.* at 1149. Waldron also raises the liberal concern about the coercive underpinnings even of “noncoercive” measures. See *id.* at 1141–52; see also *supra* text accompanying note 88.

<sup>95</sup> See RAZ, *supra* note 13, at 161.

<sup>96</sup> See Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305 (1990) (arguing that expansive liberal understandings of toleration as calling for “neutrality” wrongly ban a governmental orthodoxy promoted by proper means).

make morally upright choices.<sup>97</sup>

To the extent that arguments for governmental persuasion in the service of an orthodoxy reject an entitlement to autonomy, they reflect a model of empty toleration as opposed to a model of toleration as respect. To the extent that the anti-compulsion rationale, taken in isolation, supports a model of empty toleration, we should reject that interpretation of toleration and instead fashion a model of toleration as respect that also draws upon the principles undergirding the jurisdictional and diversity arguments for toleration, which support a realm of personal sovereignty. As I discuss in Parts IV and V, the best interpretation of what those principles imply concerning the requirement of respect for such personal sovereignty is a matter of contestation. Translating the concept of toleration to a morally pluralistic society calls into question the appropriateness of governmental promotion of an orthodoxy concerning good lives. Waldron offers important reasons for caution about government's deployment of persuasive measures in the service of such an orthodoxy. I shall argue that while a model of toleration as respect would be cautious concerning such deployment, it would not completely bar government from attempting to shape the exercise of deliberative autonomy. Toleration as respect imposes requirements of reason-giving in the deliberative process and calls for careful judicial scrutiny of the reasons for which government acts and the ends it seeks to further (e.g., whether it advances public values or a sectarian orthodoxy), and whether they justify the imposition upon rights of autonomy. I now turn to constitutional law to examine the deployment of the anti-compulsion rationale. I then consider the abortion funding cases from the standpoint of a model of toleration as respect, arguing that those cases fail the requirements of such a model.

### C. *Compulsion and Persuasion in Constitutional Law*

What light does constitutional jurisprudence shed on the contemporary scope and relevance of the anti-compulsion rationale for toleration and its implications concerning governmental promotion of an orthodoxy? The anti-compulsion rationale is an important underpinning of the principle of religious toleration reflected in the First Amendment. As the Court has explained, "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience

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<sup>97</sup> See GEORGE, *supra* note 70, at 43–44, 167–88, 228–29. Waldron, who contends that Locke's argument for toleration rests upon the irrationality of intolerance, see *supra* note 75 and accompanying text, rests his own liberal argument for autonomy upon a conception of neutrality and equal respect. See Waldron, *supra* note 85, at 1097–99, 1133–38.



which are the sole assurance that religious faith is real, not imposed.”<sup>98</sup> The First Amendment resembles Lockean toleration in its eschewal of governmental coercion to establish either an official religion or any other religion (the Establishment Clause), as well as in its prohibition against denying persons civil rights based on their religious beliefs (the Free Exercise Clause).<sup>99</sup> But it clearly departs from Lockean toleration to the extent that Locke’s model leaves room for governmental persuasion, or moralizing, in favor of a preferred religion or a governmental orthodoxy. Constitutional principles require not only that government “may not coerce anyone to support or participate in religion or its exercise,” but also that government may not “otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>100</sup> For it is not only outright governmental coercion that threatens and diminishes freedom of conscience, but also governmental persuasion: the historical lesson behind the Establishment Clause was recognition that “in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.”<sup>101</sup>

But this prophylactic rule against governmental persuasion concerning religion does not translate into a general prohibition on persuasion in matters of democratic and personal self-government. In other areas of constitutional jurisprudence, the distinction between compulsion and persuasion is familiar. In *West Virginia State Board of Education v. Barnette*,<sup>102</sup> the Court rejected the notion of governmental officials dictating an orthodoxy through a compulsory flag salute and expulsion of noncomplying children from school and punishment of their parents; yet the Court did not question the state’s authority to foster the ends of “national unity” and patriotism “by persuasion and example” (e.g., the curriculum).<sup>103</sup> Indeed, the Court did not expressly rule out the use of a voluntary flag salute to achieve such ends.<sup>104</sup> As *Barnette* and cases involving

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<sup>98</sup> *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

<sup>99</sup> The freedom of conscience protected by the First Amendment is broader than that advocated by Locke, who denied protecting freedom of conscience of Catholics and atheists (for reasons couched in “civil” terms), see LOCKE, *supra* note 7, at 49–52, because it “embraces the right to select any religious faith or none at all.” *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985).

<sup>100</sup> *Weisman*, 505 U.S. at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

<sup>101</sup> *Id.* at 591–92.

<sup>102</sup> 319 U.S. 624 (1943).

<sup>103</sup> *Id.* at 640.

<sup>104</sup> See *id.* at 641 (indicating approval for “patriotic ceremonies [that] are voluntary and spontaneous instead of a compulsory routine”); see also *Weisman*, 505 U.S. at 638–39 (Scalia, J., dissenting) (stating that *Barnette* “did not even hint that [public school students]

conflicts between parental rights and the state's authority to educate children make clear, fundamental constitutional rights of self-determination protect against governmental use of coercion or criminal sanction, but do not always translate into a right to governmental neutrality or against governmental sidetaking through noncoercive means. Thus, punishing parents for directing their children not to salute the flag or for sending their children to private schools violates a fundamental right of parents to direct the upbringing of their children; preferring and promoting patriotism or public over private education does not.<sup>105</sup>

Constitutional substantive due process jurisprudence about rights of intimate association and procreative autonomy similarly recognizes a line between compulsion and persuasion. This jurisprudence appeals to the twin bases for the anti-compulsion rationale: the irrationality of the means employed by government to secure its ends and the entitlement of individual liberty (as well as privacy) in these matters because of their importance to personhood. For example, the Court struck down state bans on distribution of contraceptives because it was irrational to presume a "scheme of values" whereby the state sought to deter nonmarital sex through prescribing pregnancy, the risks of abortion, and unwanted childbirth as punishment for fornication.<sup>106</sup> But the Court also invoked a right of autonomy, or "the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>107</sup>

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could not be compelled to observe respectful silence—indeed, even to *stand* in respectful silence—when those who wished to recite it did so"). But some commentators argue that, in light of *Weisman*, which invalidated voluntary prayer at a graduation ceremony due to its coercive potential, even a voluntary pledge of allegiance led by teachers in public schools is unconstitutional. See Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451 (1995).

<sup>105</sup> For this interpretation of education cases such as *Barnette*, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *HARV. L. REV.* 989, 1034–36 (1991); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 *B.U. L. REV.* 593, 606–10 (1990).

<sup>106</sup> See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 694–95 (1977) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972)). As Justice Stevens memorably put it, it would be "as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse." *Carey*, 431 U.S. at 715 (Stevens, J., concurring).

<sup>107</sup> *Eisenstadt*, 405 U.S. at 453.

Nonetheless, in its much-criticized opinion in *Bowers v. Hardwick*,<sup>108</sup> the Court rejected a challenge to Georgia's sodomy law based on its irrationality and impingement upon an entitlement to autonomy in matters of intimate association, and upheld governmental intolerance toward "homosexual sodomy" (and, arguably, toward gay men and lesbians as well) and the enforcement of a sexual orthodoxy through the criminal law.<sup>109</sup>

Although the contraception cases do not answer the question of the scope of government's authority to moralize in favor of a preferred conception of sexual morality or reproduction, defining the individual entitlement to procreative autonomy as one to freedom from "unwarranted" governmental interference implies that certain forms of governmental action in service of certain ends are not unwarranted. Abortion jurisprudence builds on that implication by upholding governmental persuasion in favor of childbirth over abortion, so long as it does not constitute an "undue burden" on the "ultimate decision."<sup>110</sup> As such, it is an excellent illustration of the tension between the models of empty toleration and toleration as respect and of how they offer competing interpretations of the requirements of the anti-compulsion rationale. At best, abortion jurisprudence upholding selective funding of childbirth over abortion reflects a model of empty tolerance; indeed, it may even blur the distinction between compulsion and persuasion, and thus may reflect an official stance of intolerance toward abortion. In any event, it fails to satisfy a model of toleration as respect.

### 1. *The Asymmetry of Empty Toleration: The Abortion Funding Cases*

The anti-compulsion rationale functions in the Supreme Court's abortion jurisprudence as a justification for abortion rights. To begin at the end, the joint opinion in *Planned Parenthood v. Casey* states: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, of the mystery of human life. Beliefs about these matters could not define the

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<sup>108</sup> 478 U.S. 186 (1986).

<sup>109</sup> The Court held that the Georgia statute had a rational basis in the majority of the electorate's belief in the immorality of homosexuality and that it impinged upon no fundamental right, as the Court reductively framed the issue, to engage in "homosexual sodomy." *Id.* at 190-96. For a strong critique of the Court's conflation of acts (sodomy) and identity (homosexuality) in its opinion, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993). For the import of the Court's more recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), on *Bowers*, see *infra* text accompanying notes 208-11.

<sup>110</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 877-79 (1992).

attributes of personhood were they formed under compulsion of the State.”<sup>111</sup> Compulsory pregnancy and childbearing (and, as a practical matter, motherhood) would violate not only women’s personhood and autonomy, but also their right to bodily integrity, and would impose upon them constraints, pain, suffering, and “distress.”<sup>112</sup> However, defining the boundaries of compulsion and addressing whether measures short of compulsion similarly violate personhood and bodily integrity have been contentious topics in abortion jurisprudence, as the selective funding and facilities cases illustrate.

*Maheer v. Roe*, which upheld a state ban on funds for “elective” abortions, establishes that the state need not be neutral, but may “make a value judgment favoring childbirth over abortion” (reflecting its legitimate interest in “protecting potential life”) and “implement that judgment by the allocation of public funds.”<sup>113</sup> A core premise is that the right recognized in *Roe v. Wade* was an interest in making a decision about pregnancy free from “unduly burdensome interference” (e.g., severe criminal sanctions), not a right to be free from governmental moralizing by means short of compulsion, much less a right to governmental facilitation of a decision to have an abortion.<sup>114</sup> As the *Maheer* Court put it, “Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State’s power to encourage actions deemed to be in the public interest is necessarily far broader.”<sup>115</sup> *Harris v. McRae* drew upon *Maheer* to uphold the Hyde Amendment, which forbade the use of federal funds to pay for abortions of poor women otherwise eligible for medical treatment under Medicaid (except where continuing pregnancy threatened the “life of the mother”): the Amendment “places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy,” but uses “unequal subsidization of abortion and other medical services” (i.e., childbirth) to establish “incentives” that “encourag[e] childbirth except in the most urgent circumstances.”<sup>116</sup>

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<sup>111</sup> *Id.* at 851.

<sup>112</sup> *See id.* at 852; *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that “[m]aternity, or additional offspring, may force upon the woman a distressful life and future”). There is also a good argument that criminal prohibition is an irrational means to secure a governmental goal of childbirth over abortion, since many women will resort to illegal abortions, at enormous cost to their lives and health. *See* MARK A. GRABER, *RETHINKING ABORTION* 41–64 (1996) (detailing prevalence of illegal abortion prior to *Roe*).

<sup>113</sup> *Maheer v. Roe*, 432 U.S. 464, 474 (1977).

<sup>114</sup> *Id.* at 473–74; *accord Harris v. McRae*, 448 U.S. 297, 314 (1980).

<sup>115</sup> 432 U.S. at 476; *accord Harris*, 448 U.S. at 315. The *Maheer* Court drew upon *Meyer* and *Pierce* in support of the distinction in the text. *See Maheer*, 432 U.S. at 477.

<sup>116</sup> *Harris*, 448 U.S. at 314–15, 325. The original Hyde Amendment did not include

The abortion funding cases reflect a model of empty toleration both in terms of the low level of respect they afford to abortion decisions and the latitude they accord to governmental moralizing. Such empty tolerance is also asymmetrical. Neither government nor citizens (expressing themselves through politics) need to treat two mutually exclusive reproductive choices (abortion and childbirth) as entitled to the same respect or approval or governmental assistance, nor treat moral objection to abortion as constitutionally irrelevant.<sup>117</sup> As some members of the Court have put it, the abortion right is based not on a notion that abortion is a "good in itself," but on a conviction that the "evil" of state coercion—that is, the damage to autonomy and privacy—outweighs the "evil of abortion."<sup>118</sup> A woman's right to choose to terminate a pregnancy carries with it no constitutional entitlement to the financial resources necessary to avail herself of the choice; the state has no obligation to "commit any resources to facilitating abortions" or otherwise to help her exercise her right to choose, or to foster her capacity for reflective decisionmaking.<sup>119</sup> Instead, government may have and promote an orthodoxy, that is, that childbirth is in the public interest and preferable to abortion, and may use noncoercive means to encourage the preferred choice and to disapprove of the disfavored one. Such noncoercive means include funding childbirth but not abortion for indigent women dependent upon government for their health care, providing public hospitals and medical personnel for childbirth but not abortion, and forbidding

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exceptions for rape and incest, but Congress included such exceptions in later versions.

<sup>117</sup> See *Maier*, 432 U.S. at 468 (rejecting lower court's conclusion that selective funding violates the Equal Protection Clause and that implicit in *Roe v. Wade* was the view that "abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy"); cf. *Harris*, 448 U.S. at 332–33 (Brennan, J., dissenting) (espousing this view in arguing that denial of funding for medically necessary abortions violated women's due process liberty right).

<sup>118</sup> *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 797 (1986) (White, J., dissenting, joined by Rehnquist, J.). This negative valuation of the right to abortion contrasts with the valuation of speech in First Amendment jurisprudence, in which the assumption is that society is better off with a "robust marketplace of ideas," and more speech is better than less. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1225 (1996).

<sup>119</sup> See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989); accord *Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Thornburgh*, 476 U.S. at 797–98 (White, J., dissenting) (stating that "because *Roe v. Wade* is not premised on the notion that abortion is itself desirable . . . the decision does not command the States to fund or encourage abortion, or even to approve of it"); *Harris*, 448 U.S. at 316 (no constitutional entitlement to financial resources).

medical personnel in family planning clinics receiving federal funding from even mentioning abortion.<sup>120</sup>

By their own terms, the selective funding cases turn on the distinction between governmental compulsion and persuasion. If selective funding is not simply persuasion, but tantamount to coercion, then it reflects not an empty toleration model but intolerance toward abortion. Many scholars and some dissenters on the Court have argued that the selective funding cases are wrong because such funding crosses the line between persuasion and compulsion.<sup>121</sup> Unequal subsidies, critics contend, are less offer or subsidy than threat or penalty, and thus impose an unconstitutional condition on poor women's

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<sup>120</sup> See *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Title X regulation barring recipients of Title X funds from engaging in abortion counselling and referral services); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding state refusal to allow public employees to perform abortions in public hospitals); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal Hyde Amendment barring Medicaid reimbursement of most abortions); *Beal v. Doe*, 432 U.S. 438 (1977) (upholding state regulations barring funding of abortions not certified as medically necessary); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding state regulation limiting Medicaid benefits to first trimester abortions that are "medically necessary"); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding bar on use of publicly financed hospital services for abortions).

<sup>121</sup> See, e.g., *Harris*, 448 U.S. at 330-34 (1980) (Brennan, J., dissenting) (arguing that "the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions"; in effect, government "literally makes an offer that the indigent woman cannot afford to refuse"); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 88 (1996) (arguing that, given the "special financial circumstances" of Medicaid-eligible women, "the refusal to fund abortions for poor women, when childbirth is funded, creates an almost irresistible pressure on indigent women to carry a child to term"); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2297-2308 (1990) (critiquing Court's reliance in *Harris* on subsidy/penalty distinction and its failure to explain why a refusal to subsidize is legally different from a penalty); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1300-01, 1359-76 (1984) (proposing applying three baselines for distinguishing subsidy from penalty—history, equality, and prediction—and contending that, measured by those baselines, the Hyde Amendment reduced women's choices). Some commentators argue that selective funding leaves a woman no worse off than she would be without any governmental assistance and that it even improves a woman's options. See Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 89-90 (1988); McConnell, *supra* note 105, at 1018-19. The recent film, *Citizen Ruth*, offers a surprisingly humorous treatment of the impact of financial incentives on an indigent woman's choice between abortion and childbirth.

abortion rights.<sup>122</sup> While this is a cogent argument, I believe that there are other important arguments against the asymmetry of this abortion jurisprudence, which relate to its failure to meet the requirements of toleration as respect. First, the focus on coercion is too narrow, for it fails to recognize that governmental measures short of compulsion may also threaten self-government. My interpretation of the anti-compulsion rationale urges that governmental persuasion should foster, not hinder, the capacity for self-government. Second, a careful focus upon the reasons for which government acts, rather than upon a simple compulsion/persuasion distinction, reveals that the purpose or effect of selective funding is not to advance a formative project of furthering women's capacity for self-government or to pursue public values, but to deter the exercise of a protected right of reproductive autonomy and to promote a sectarian orthodoxy about reproductive responsibility and women's "natural" role. Moreover, by targeting poor women for such impermissible moralizing, government offends principles of equal citizenship and fairness.

## 2. Toleration as Respect and Scrutiny of Governmental Purposes

In *Casey*, the joint opinion explained that under the "undue burden" test, a state regulation that "has the *purpose or effect* of placing a substantial obstacle in the path" of a pregnant woman seeking abortion (prior to viability) is invalid.<sup>123</sup> Although *Casey*'s "undue burden" test draws upon the formulation of an abortion right found in *Maher* and *Harris*, it puts a gloss upon this test that focuses upon a woman's right to personal self-government: "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."<sup>124</sup> Although I criticize *Casey* (in Part IV) for its application of this test, it opens the door for the inquiry into governmental purposes and effects called for by a model of toleration as respect.

It is often said that the Court will not inquire into legislative motive.<sup>125</sup> Yet

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<sup>122</sup> See *id.* In the literature on unconstitutional conditions, which addresses the question of when governmental imposition of burdens upon or attachment of conditions to the exercise of constitutional rights is unconstitutional, one common approach is that what distinguishes impermissible from permissible governmental action is the distinction between subsidy and penalty, or offer and threat. See Sunstein, *supra* note 105, at 601-04; Kreimer, *supra* note 121, at 1300-01, 1359-76.

<sup>123</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (emphasis added).

<sup>124</sup> *Id.*; see *id.* at 874-75 (invoking *Maher* and *Harris* in declaring that the undue burden test was the appropriate test under which to evaluate regulation of abortion).

<sup>125</sup> *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968). Thus, the argument goes,

*Casey* directs that "purpose" is relevant in assessing undue burden and, ultimately, constitutionality. Indeed, scrutinizing the purposes or ends of legislation is an unavoidable part of judicial review and, at least in some contexts, it is appropriate that the Court show heightened concern for flushing out illicit purposes.<sup>126</sup> In her proposed reformulation of the unconstitutional conditions inquiry, away from a focus on coercion, Professor Kathleen Sullivan persuasively calls for strict review of "any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government."<sup>127</sup> Arguably, if a primary purpose of the Hyde Amendment was to put pressure upon or frustrate the abortion right, then such heightened scrutiny is appropriate.<sup>128</sup>

Evaluating the purposes of the Hyde Amendment under such a test, and even under *Casey*, suggests ample ground for invalidation. After examining the Hyde Amendment and the Congressional debates, the lower court in *Harris* concluded that the "dominant purpose was to prevent exercise of the right to decide to terminate pregnancy and to prevent the funds of taxpayers who disapproved of abortion on moral grounds from being used to finance abortions that were abhorrent to them."<sup>129</sup> Its purpose was to be a second-best assault on legal abortion, after the failure of the preferred strategy of amending the Constitution to add a right to life for the unborn and, thus, bar legal abortion.<sup>130</sup> Those whose preferred stance on abortion was intolerance sought to "save as many lives as possible" by stopping as many abortions as possible through

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so long as a law could in principle serve a valid purpose, the Court should be reluctant to invalidate it just because it was actually enacted for an illegitimate reason. See Dorf, *supra* note 118, at 1234 (discussing *O'Brien* and other cases).

<sup>126</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 136-48 (1980). For Ely's critique of *Maier*, see *id.* at 162\*, 246 n.38, 248-49 n.52.

<sup>127</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1499-1500 (1989). For a similar proposal to shift from a focus on coercion to a focus on reasons, see Sunstein, *supra* note 105. Both Sullivan and Sunstein argue that one strong reason for such a shift is because of the problem of identifying the relevant baseline from which to assess whether a condition is coercive (i.e., more threat than offer). See Sullivan, *supra*, at 1422-57; Sunstein, *supra* note 105, at 601-04.

<sup>128</sup> See Dorf, *supra* note 118, at 1235.

<sup>129</sup> *McRae v. Califano*, 491 F. Supp. 630, 737 (E.D.N.Y. 1980).

<sup>130</sup> Here I draw on the legislative history summarized in the Annex to the District Court's opinion in *McRae*, 491 F. Supp. at 742-844. See also LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 144-59 (1990) (describing efforts by antiabortion movement to restrict abortion funding).



restricting public funds.<sup>131</sup> When criticized for going after only poor women's access to abortion, Congressman Hyde replied: "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill."<sup>132</sup>

This legislative history strongly indicates that selective funding serves an impermissible governmental purpose of pressuring the exercise of women's right to choose abortion. As such, it violates a model of toleration as respect unless government has sufficient justification for such action—I will argue that it does not. Selective funding also violates that model because it impermissibly seeks to advance a sectarian governmental orthodoxy and does not foster women's responsible self-government.

A helpful starting point for understanding how selective funding advances a governmental orthodoxy in violation of toleration as respect is Justice Brennan's argument, in dissent in *Harris*, that selective funding violated poor women's privacy rights because it allowed the state to "foist" upon them, a politically powerless group, a "state-mandated morality." As Brennan put it, such funding imposes through law "the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual."<sup>133</sup> Brennan here relies not only on an anti-compulsion argument, but also on the jurisdictional argument for toleration as respect: that persons have an entitlement to a realm of personal self-government, or individual autonomy, free from governmental intrusion. When government uses selective funding, it alters this balance between individuals and government by encroaching upon this realm of autonomy to promote its preferred view.<sup>134</sup> I would contrast such impermissible promotion of an orthodoxy with the constitutional principle that states may prohibit abortions after viability. In the latter case, it is arguable that government does

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<sup>131</sup> See, e.g., *McRae*, 491 F. Supp. at 752–53, 766 (reporting views of Rep. Hyde). When the Hyde Amendment and other funding restrictions on abortion come up for renewal in Congress, proponents often refer to the number of lives saved by such legislation. See, e.g., 139 CONG. REC. H8523 (daily ed. Oct. 27, 1993) (statement of Rep. Dornan); 139 CONG. REC. S12576–77 (daily ed. Sept. 28, 1993) (statement of Sen. Smith). Prior to the Hyde Amendment, nearly one third of abortions taking place involved Medicaid funds. See *McRae*, 491 F. Supp. at 639 (1980); *TRIBE*, *supra* note 130, at 151 (stating that prior to 1976 nearly 33% of all legal abortions were funded by Medicaid).

<sup>132</sup> *McRae*, 491 F. Supp. at 773 (quoting Rep. Hyde).

<sup>133</sup> *Harris v. McRae*, 448 U.S. 297, 332 (1980) (Brennan, J., dissenting).

<sup>134</sup> See Sullivan, *supra* note 127, at 1491–93 (arguing that one distributive concern that her model addresses is preserving autonomous private decisionmaking).

not advance a sectarian or particular religious view about when life begins, but instead promotes a public value of respect for life and for the sanctity of life.<sup>135</sup> Given the considerable conscientious disagreement among citizens about the status and moral claims of prenatal life, government's decision selectively to fund childbirth and not abortion "on the ground that such abortions are not 'in the public interest' is tantamount to establishing one interpretation of the sanctity of life as the official creed of the community."<sup>136</sup> To be sure, a common justification for selective funding is that it serves the legitimate governmental interest in preventing taxpayers, in violation of the dictates of conscience, from being forced to support abortion, which they find morally abhorrent and evil, through public funds.<sup>137</sup> Supporters of the Hyde Amendment (whose preferred stance on abortion is generally intolerance and legal prohibition) argue that to tolerate a right to legal abortion (despite moral objections) is one thing, but to enlist government (and, ultimately, citizens) in facilitating, promoting, or endorsing it through the allocation of funds goes beyond toleration to endorsement and approval.<sup>138</sup>

However, the proposition that affording taxpayers a conscientious objection

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<sup>135</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 914-15 (1992) (Stevens, J., concurring in part, dissenting in part) (characterizing state's interest as humanitarian and pragmatic, although not grounded in the Constitution); DWORKIN, *LIFE'S DOMINION* 148-59 (1993) (arguing that government may act to protect the intrinsic value of the sanctity of life).

<sup>136</sup> DWORKIN, *supra* note 135, at 175-76 (making this point concerning medically necessary abortions). Because abortion decisions are essentially religious, Dworkin argues, this raises a "much more serious First Amendment issue than the Court recognized." *Id.* at 175. Dworkin also suggests that the cases may warrant reconsideration because unequal funding comes close to compulsion. *Id.* at 175-76.

<sup>137</sup> See McConnell, *supra* note 105, at 1047; Epstein, *supra* note 121, at 92-94. The legislative debates over the Hyde Amendment are replete with this argument about forcing taxpayers to violate their consciences. See, e.g., *McRae*, 491 F. Supp. at 691 (describing as "secondary justification" for restrictions on abortion funding, offered in the debates, "that taxpayers who reprobated abortion on moral or religious grounds should not have their taxes used to defray costs of abortions"); *id.* at 743-844 (reporting repeated invocation of this argument).

<sup>138</sup> See, e.g., 139 CONG. REC. S12578 (daily ed. Sept. 28, 1993) (statement of Sen. Smith) (arguing that the majority of Americans have reached "uneasy consensus" that abortion should be legal (although they disapprove of it), but draw the line at paying for other people's abortions; government sends wrong message by paying); see also *McRae*, 491 F. Supp. at 755 (reporting views of Rep. Russo that government should assume a "neutral stance in this matter—neither interfering with the constitutional rights of the woman, nor encouraging it through the use of tax dollars"); TRIBE, *supra* note 130, at 153 (reporting Jimmy Carter's stance that government should be kept out of the decision and not do anything to encourage abortion).

to governmental expenditures is a legitimate governmental purpose is subject to serious question.<sup>139</sup> Moreover, the Hyde Amendment sweeps far more broadly than necessary to afford such an opt-out. By prohibiting all public funding of poor women's abortions, it forces all citizens, some of whom may support public funding for poor women's reproductive health care, to conform with the moral and religious opposition of a group of citizens to abortion. Although supporters of selective funding justify it as a second-best strategy to stop abortion, this justification should not suffice so long as the abortion decision has constitutional protection as being "central to personal dignity and autonomy."<sup>140</sup>

This governmental orthodoxy reflects both hostility to abortion rights and sectarian views concerning women's proper role. Feminist and liberal analyses of the sex equality dimension of the abortion issue illuminate the content of this impermissible orthodoxy.<sup>141</sup> Only women become pregnant and bear the burdens of pregnancy and, thus, the consequences of restrictive abortion laws. And it is not nature, but governmental regulation, that "exaggerate[s] the cost of these burdens" and turns women's reproductive capacity into a source of disadvantage when the state prohibits or restricts abortion.<sup>142</sup> Prohibitions on abortion reflect an attempt to conscript and compel women into this "natural" role, which reflects less on women's "nature" than on ideology about women's nature and proper gender roles. As Justice Blackmun's partial concurrence in *Casey* observes, this assumption about forcing women into the "'natural' status and incidents of motherhood" rests upon "a conception of women's role that

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<sup>139</sup> See *TRIBE*, *supra* note 130, at 205–06; Sullivan, *supra* note 127, at 1506 n.391.

<sup>140</sup> Cf. Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 175 (1996) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), to argue against government's ability to characterize abortion as a "positive harm").

<sup>141</sup> For feminist analyses of the sex equality issue relevant to the argument developed in text, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. REV.* 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261 (1992); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 257–90, 315–17 (1993) (advancing anticaste argument rooted in Equal Protection Clause for abortion rights); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15–10 (2d ed. 1988) (drawing on feminist and liberal arguments to elaborate anticonscription justification for abortion rights). For a similar argument made from a privacy perspective, see Jed Rubenfeld, *The Right of Privacy*, 102 *HARV. L. REV.* 737 (1989).

<sup>142</sup> Law, *supra* note 141, at 1016; see SUNSTEIN, *supra* note 141, at 274.

has triggered the protection of the Equal Protection Clause.”<sup>143</sup> Arguably, if government may not enforce this impermissible gender orthodoxy through criminal sanctions, it may not do so through such measures as selective funding.<sup>144</sup> And although this is an argument with important Equal Protection roots, principles of toleration, rooted in Due Process liberty rights of privacy and deliberative autonomy, should also constrain government’s promotion of this orthodoxy.<sup>145</sup>

Selective funding also violates a model of toleration as respect because it does not foster women’s capacity for self-government or reflective decisionmaking about reproduction. There is no pretense in the Court’s defense of such governmental measures that they foster self-government: facilitating women’s autonomous choice or their reflective decisionmaking is not the point; discouraging abortions is. To the extent that government advances a perfectionist vision, or seeks to help women live good lives, it is one in which promoting childbirth as the right choice trumps any concern for facilitating pregnant women’s own choices. Thus, in *Harris*, the Court upheld steering toward childbirth in the face of lower court findings that pregnancy and childbirth in many cases would pose serious risks to poor women’s physical and mental health and conflict with their own conscientious religious beliefs about responsible reproductive choice.<sup>146</sup> The point is not to secure preconditions for autonomy, but to use funds to steer poor pregnant women to act according to government’s preference.<sup>147</sup> The Court’s formalistic and narrow view of free

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<sup>143</sup> 505 U.S. at 928.

<sup>144</sup> Sullivan reaches a similar conclusion. See Sullivan, *supra* note 127, at 1506 n.538. See also Sunstein, *supra* note 105, at 614–20 (arguing under anticonscription analysis that government at least ought to fund abortions in cases of rape and incest).

<sup>145</sup> See Rubinfeld, *supra* note 141, at 788–90 (offering anticonscription, or antitotalitarian, interpretation of right to privacy). For an argument that we should make both privacy or autonomy arguments and equal protection arguments in such contexts, see James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 260–75 (1993).

<sup>146</sup> See *McRae v. Califano*, 491 F. Supp. 630, 668–90 (E.D.N.Y. 1980); see also *Harris*, 448 U.S. at 353–54 (Stevens, J., dissenting) (citing record below for point that “[i]t cannot be denied that the harm inflicted upon women in the excluded class is grievous” and that the funding restrictions did not encourage “normal” childbirth); *id.* at 345 (Marshall, J., dissenting) (same).

<sup>147</sup> See *Beal v. Doe*, 432 U.S. 438, 458–59 (1977) (Marshall, J., also dissenting in *Maier*) (arguing that the restrictions rob an indigent pregnant woman of the chance “to control the direction of her own life”). Nonetheless, there may be an implicit argument that, because childbirth costs are greater than the costs of an abortion, selectively funding childbirth may assist indigent women who would otherwise choose or feel pressured to choose abortion out of concern for the greater expense of childbirth. See *Maier v. Roe*, 432 U.S. 464, 478–79

versus coerced choice here contrasts with its solicitude in other contexts for even "subtle" or indirect coercion, particularly when persons' "autonomy and well-being are already compromised by poverty [and] lack of access to good medical care"—as the Court recently characterized persons who might be pressured to consent to physician-assisted suicide.<sup>148</sup>

The Court's reductive notion of women's unfettered choice and its narrow conception of governmental responsibility in the selective funding cases has fueled extensive feminist criticism of those cases as illustrative of the limits of liberal toleration and privacy doctrine.<sup>149</sup> No doubt, the Court's abortion jurisprudence fails to offer a robust model of governmental responsibility to facilitate women's reproductive autonomy (which a model of toleration as respect, informed by feminist analysis, would try to do). But the disrespect for poor women's autonomy reflected in selective funding and in the Court's jurisprudence upholding it offends the requirements of toleration as respect. If, under the anti-compulsion rationale for toleration, persuasion that fosters the exercise of self-government is the paradigm example of permissible governmental action, surely selective funding lacks the earmarks of such persuasion. The history of such restrictions reveals that funding for poor women's abortions hinders, rather than fosters, their self-government, whether the effect is, as in some cases, compulsory childbearing, or, as in others, personal and family hardship undergone to obtain an abortion and increased health risks due to the delay in obtaining an abortion.<sup>150</sup>

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(1977); *see also* *McRae*, 491 F. Supp. at 783 (reporting that proponents of Hyde Amendment stated that it would protect poor women from pressure to undergo abortion). But equal funding of abortion and childbirth would also address this concern.

<sup>148</sup> *Washington v. Glucksberg*, 117 S. Ct. 2258, 2273 (1997) (recognizing state interest in protecting vulnerable groups from being pressured into physician-assisted suicide; rejecting constitutional right to physician-assisted suicide). Chief Justice Rehnquist, who wrote this opinion, has voted with the majority in every selective funding and facilities case since his appointment to the Court. *See also* *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (recognizing that "subtle and indirect pressure" resulting from prayer at graduation ceremony "can be as real as any overt compulsion").

<sup>149</sup> *See, e.g.,* CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 93, 93–102 (1987).

<sup>150</sup> *See* James Trussell et al., *The Impact of Restricting Medicaid Financing for Abortion*, 12 FAM. PLAN. PERSP. 120 (1980) (reporting that "one-fifth of Medicaid-eligible women who needed abortions were, in their view, forced to undergo compulsory childbearing"); Stanley K. Henshaw & Lynn S. Wallish, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 FAM. PLAN. PERSP. 170 (1984) (reporting "relatively serious" consequences in 58% of Medicaid-eligible women and their families, including financial sacrifices, and delays in obtaining abortions in some women due to time needed to get

Finally, a toleration as respect model rejects selective funding because it disproportionately burdens poor women, and thus violates norms of equality and fairness. The history of the Hyde Amendment reveals that government singles out poor women for moralizing against abortion because it can: their dependency affords government greater leverage over them than over other women. Sullivan argues that one systemic concern underlying unconstitutional conditions doctrine should be preventing "constitutional caste": government's intervention such as selective funding may create hierarchies among classes of rights holders, which may exacerbate background inequalities of wealth and resources.<sup>151</sup> Notwithstanding public ambivalence about abortion, unequal subsidization of poor women's medical care, which threatens to make abortion rights available to nonindigent or wealthy women only, is not an acceptable means of compromise on the divisive abortion issue.<sup>152</sup> The fact that, because women of color are disproportionately poor and dependent upon need-based governmental subsidies, the burden of such unequal subsidization falls heavily upon them strengthens the case for the unfairness of this compromise, as does the history of governmental and societal disregard for and disrespect of the reproductive autonomy of women of color.<sup>153</sup> And notwithstanding the negative Constitution, a consistent theme in legislative and other opposition to the Hyde Amendment is that principles of equality and fairness impose upon government a moral, if not also a constitutional, responsibility to make reproductive rights equally accessible to and meaningful for all women, rich or poor.<sup>154</sup>

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financing); see also 139 CONG. REC. S12585-86 (daily ed. Sept. 28, 1993) (statement of Sen. Boxer) (arguing that funding restrictions have impaired and burdened women's autonomy by making the abortion choice more costly in terms of short-term financial expense and increased risks to women's health from later abortions, due to delays related to financial constraints). But see Deborah Haas-Wilson, *Women's Reproductive Choices: The Impact of Medicaid Funding Restrictions*, 29 FAM PLAN. PERSP. 228, 231 (1997) (concluding that "restrictions on Medicaid funding have little, if any, effect, on women's reproductive decisions," but noting that "the use of aggregate abortion rates may hide the effects" of policies targeting poor women).

<sup>151</sup> Sullivan, *supra* note 127, at 1496-98.

<sup>152</sup> See GUTMANN & THOMPSON, *supra* note 121, at 88-89; TRIBE, *supra* note 130, at 206. See also Harris, 448 U.S. at 349-54 (Stevens, J., dissenting) (arguing that when such restrictions apply even to abortions medically necessary for women's health, they violate an Equal Protection requirement of governmental impartiality in the distribution of governmental benefits to otherwise qualified individuals and inflict a severe punishment on pregnant women).

<sup>153</sup> See Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993).

<sup>154</sup> This theme of equal access and avoiding discrimination is recurrent in legislative

In this Part, I have examined the implications of the anti-compulsion rationale and argued for an interpretation of it that supports a model of toleration as respect. To the extent the rationale, taken in isolation from other rationales, yields only an empty toleration model, I shall argue that the jurisdictional and diversity rationales support toleration as respect.

#### IV. THE JURISDICTIONAL RATIONALE FOR TOLERATION

A second justification for toleration, the jurisdictional rationale, is that government should refrain from acting or regulating in certain spheres of conscience and conduct because securing uniformity or orthodoxy in those spheres is not the proper business of government. But why not? If the anti-compulsion rationale rests in part on an assumption about proper governmental means, the jurisdictional rationale appears to rest on an assumption about proper governmental ends or functions. Moreover, at least in contemporary formulations, the latter rationale rests on a notion of personal sovereignty or moral independence from the state with respect to a realm of thought and action, as well as an assumption that such an allocation of power between persons and the state is appropriate given the facts of human diversity and moral pluralism.

In this Part, I develop and endorse the jurisdictional rationale for toleration as an important foundation for a model of toleration as respect. I argue for an interpretation of the jurisdictional rationale that avoids two common misconceptions, which arise from the assumption that it depends upon a sharp distinction between public and private life.

First, feminist critics reject the jurisdictional rationale to the extent it appears to rest upon a public/private distinction, leading to governmental abdication of responsibility for securing women's liberty and equality. I contend that accepting the jurisdictional rationale does not require such abdication or such a truncated view of the proper business of government. Second, some critics of the jurisdictional rationale charge that it leads to empty toleration (as seen in Justice Scalia's dissent in *Romer*), which leaves government too much room to moralize against disfavored ways of life, so long as it refrains from using force to reach purely private behavior. Using the battle over gay and lesbian rights as an example, I argue that the jurisdictional rationale better supports a model of toleration as respect, which requires affording gay men and

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debates over the Hyde Amendment. See *McRae*, 491 F. Supp. at 749-51 (reporting letter by United States Commission of Civil Rights); *id.* at 751-844 (reporting numerous examples of this argument); 139 CONG. REC. H4323 (daily ed. June 30, 1993) (statement of Rep. Lowey); 139 CONG. REC. S12583 (daily ed. Sept. 28, 1993) (statement of Sen. Metzenbaum).

lesbians equal basic liberties.

Several interpretive questions arise concerning the implications of the jurisdictional rationale for a formative project. Just how inviolate must the protected sphere of personal belief and conduct be? If the jurisdictional argument holds that it is not the proper business of government to coerce uniformity of thought or conduct, does it similarly imply that it is not government's proper business to have a preferred view or orthodoxy concerning such thought and conduct and to promote it even by noncoercive means? Does the jurisdictional rationale impose more stringent limits upon a governmental formative project than the anti-compulsion rationale?

As applied in constitutional law, the jurisdictional argument for toleration sometimes leads to restraint on governmental persuasion and at other times echoes the anti-compulsion rationale in distinguishing compulsion from persuasion. I examine the tension within the Court's abortion jurisprudence over these competing understandings of the implications of the jurisdictional argument, using the informed consent cases, especially *Casey*, as an example. I argue that, at a minimum, toleration as respect would support encouraging persons to engage in reflective decisionmaking concerning the exercise of protected liberties, for this fosters, rather than hinders, personal self-government. I argue that this is a better approach than that upheld by the *Casey* joint opinion permitting governmental persuasion, or moralizing, against a protected choice, under the rubric of facilitating responsible, reflective self-government. I do not contend that a toleration as respect model could never embrace governmental persuasion concerning matters of personal self-government, or that such persuasion could never serve a facilitative role in fostering agency. But we have not yet seen such a model of persuasion in the context of abortion regulation; such factors as the problematic content of the perfectionist vision of responsible reproductive choice that government seeks to promote, along with public inattention to the preconditions for responsible reproduction, make the equation of persuasion with facilitation problematic here in a way that it might not be in other contexts.

### *A. The Proper Business of Government and the Harm Principle*

Locke's formulation of the jurisdictional argument for toleration sharply distinguished the sphere of religious belief and salvation from the proper business of government and appealed to a model of impartiality (or neutrality), at least with respect to religion. The "business of civil government" must be distinguished from that of religion, and the civil magistrate, "by the impartial execution of equal laws," must "secure unto all people in general, and to every one of his subjects in particular, the just possession of these things belonging to



this life,” that is, their civil interests.<sup>155</sup> Locke argued that the commonwealth and its civil rights should be open to all, regardless of religion. He condemned members of one religion who would use the state to persecute others because this matter “does not at all belong to the jurisdiction of the magistrate, but entirely to the conscience of every particular man.”<sup>156</sup> A person’s soul and its salvation are his or her business. In effect, Locke’s jurisdictional argument for toleration recognized “the inviolability of a separate individual sphere of moral experience and its expression.”<sup>157</sup>

One argument advanced by Locke in support of this jurisdictional argument is that sins are not punished by government because they are not prejudicial to other persons’ rights and do not breach the public peace of societies.<sup>158</sup> So put, Locke’s jurisdictional argument seems to support the inference that government should refrain from moralizing to secure orthodoxy in matters of belief and conduct that do not directly harm and therefore concern the polity. As noted in Part III, Locke appeared to endorse the idea that a public official, like a private citizen, might employ persuasion in the service of correcting religious errors. Nonetheless, Locke’s conception of the proper business of government may lend support to interpreting the jurisdictional argument as limiting governmental moralizing: because people enter into civil society to secure and protect their possessions and interests, not to find salvation, government’s business and its proper “jurisdiction” concerns security, not citizens’ salvation (and, by implication, their virtue).<sup>159</sup>

Contemporary arguments for toleration translate the jurisdictional argument from the sphere of religious belief, narrowly conceived, to a broader realm or sphere of decisionmaking about one’s way of life, or personal self-government. Perhaps the most famous precursor for such a jurisdictional argument is Mill’s defense of liberty, in which he proposed a principle that the limit to society’s legitimate power over the individual is self-protection, that is, harm to society, as distinguished from harm to self.<sup>160</sup> The basis for this harm principle was the appeal to utility, grounded in the interests of human beings understood as “progressive” beings. On Mill’s model of human development, a person, free

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<sup>155</sup> LOCKE, *supra* note 7, at 17.

<sup>156</sup> *Id.* at 58.

<sup>157</sup> Ingrid Creppel, *Locke on Toleration: The Transformation of Constraint*, 24 POL. THEORY 200, 203 (1996).

<sup>158</sup> See LOCKE, *supra* note 7, at 43. This argument is a precursor to Mill’s harm principle, discussed *infra* text accompanying notes 160–61.

<sup>159</sup> See *id.* at 58.

<sup>160</sup> See MILL, *supra* note 8, at 10–11.

from coercive interference, grows and flourishes like a tree, pursuant to his or her best judgment about the best way of life.<sup>161</sup> Whether and how Mill's jurisdictional argument similarly extends to government employing measures short of coercion when the harm principle is not in play is unclear. As noted in Part III, he supported society using persuasion in such matters, but offers no crisp line between persuasion and "social tyranny" and little guidance as to the permissible boundaries of collective efforts at persuasion, whether by society or by government.

Neither Locke's nor Mill's formulation of the jurisdictional argument, taken alone, offers a complete foundation for the contemporary jurisdictional argument for a model of toleration as respect. Such a model shares with perfectionist thought a more ambitious conception of the proper business of government than that espoused by Locke. And although some variant on Mill's harm principle is an important foundation for the jurisdictional argument,<sup>162</sup> it is not the only one. These historical accounts helpfully suggest that the jurisdictional argument properly rests upon a mixture of prudential and normative grounds. The prudential argument is that a stable polity can exist without governmental use of force to secure uniformity of belief and conduct in certain spheres and that the exercise of such governmental force would, in fact, have detrimental consequences for persons and for society. The normative argument rests upon respect for persons' moral powers, dignity, and equal moral worth. Setting limits upon governmental exercise of power stems from an entitlement to a realm of personal sovereignty and the protection of equal basic liberties necessary to secure persons' status as free and equal citizens and to foster development and exercise of their moral powers.<sup>163</sup> (The jurisdictional argument also implicates the diversity rationale for toleration (discussed in Part V): recognizing this allocation of power between individuals and government is appropriate because of human diversity and moral pluralism.) But the jurisdictional rationale does not imply that government has no responsibility to foster the development of those moral powers.

### B. *The Jurisdictional Argument in Constitutional Law*

[T]he Constitution "neither knows nor tolerates classes among citizens."

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<sup>161</sup> See *id.* at 56.

<sup>162</sup> For two contemporary examples of liberal theory utilizing a harm principle, see RAZ, *supra* note 13; RICHARDS, *supra* note 91. Perhaps the most elaborate contemporary application of the harm principle is JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (four volumes) (1984–1988).

<sup>163</sup> See RAWLS, *supra* note 6, at 18–20, 201–03.

*Plessy v. Ferguson* . . . . [T]hose words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.

. . . .  
 . . . Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.

— Justice Anthony Kennedy<sup>164</sup>

### 1. *Defining the Limits of Constitutional Liberty*

The jurisdictional argument is a prominent underpinning of the constitutional principle of the separation of church and state. First Amendment jurisprudence teaches that, by constitutional design, the preservation and transmission of religious beliefs and worship is “a responsibility and a choice committed to the private sphere”; government has a duty to respect the “sphere of inviolable conscience.”<sup>165</sup> Government not only must refrain from coercion in matters of religion, but also should not be in “the business” of carrying on a religious program for its citizens (even by noncoercive means).<sup>166</sup>

The protection of civil rights of members of society irrespective of their religious beliefs and practices, through the Free Exercise Clause, resembles Locke's ideal of government's impartiality.<sup>167</sup> Although generally not couched in the language of toleration, Equal Protection jurisprudence and anti-discrimination law also reflect the jurisdictional rationale and an ideal of impartiality: they protect citizens against invidious discrimination because

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<sup>164</sup> *Romer v. Evans*, 116 S. Ct. 1620, 1623, 1628 (1996).

<sup>165</sup> *Lee v. Weisman*, 505 U.S. 577, 589–90 (1992).

<sup>166</sup> *Id.* at 588, 589–90.

<sup>167</sup> But free exercise is not absolute exercise, and (by analogy to Locke's support for laws prohibiting, for civic reasons, religious practices) a source of continuing controversy is government's proper authority to reach or burden religious exercise through laws of general application. See *Employment Div. Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (upholding, against free exercise claim, denial of unemployment benefits to members of Native American Church fired by private employer for use of peyote for sacramental purposes; ingestion of peyote prohibited under Oregon law). In response to *Smith*, *inter alia*, Congress passed the Religious Freedom Restoration Act of 1993 (“RFRA”), 42 U.S.C. § 2000bb (1996), which required that, because even laws “neutral” toward religion may interfere with religious exercise, governments must satisfy a compelling interest test. The Supreme Court struck down RFRA in *City of Boerne v. P.F. Flores*, 117 S. Ct. 2157 (1997).

certain characteristics (including, e.g., religion, race, and sex) are morally irrelevant to persons' ability to contribute to society and should not be the basis of disadvantage.<sup>168</sup>

As with the anti-compulsion rationale, the jurisdictional rationale undergirds the Establishment Clause's prophylactic rule against governmental promotion of and persuasion concerning religion, but does not translate into a similar rule regarding citizens' exercise of democratic and personal self-government.<sup>169</sup> As *Barnette* and other cases involving the education of children indicate, government must respect fundamental rights by refraining from such improper means as coercion, but it has considerable latitude to promote such ends as patriotism and the values requisite for citizenship and democratic self-government.<sup>170</sup> Today, government so routinely engages in many functions aimed at educating, informing, entertaining, warning, and persuading citizens that it would be "absurd" to adopt the proposition that government speech, *per se*, is an "illegitimate enterprise."<sup>171</sup>

Does the jurisdictional argument offer any parameters for the limits to government's proper authority with reference to persuasion short of compulsion in matters of personal self-government? The idea of an entitlement to self-government in the sense of deliberative autonomy is seen in justifications for a "sphere" or "realm" of constitutionally protected liberty "which the government may not enter," within which persons may make important "intimate" or personal decisions free from "unwarranted" governmental intrusion.<sup>172</sup> The idea that such a realm should be "largely beyond the reach of government" stems both from the Framers' concern to set limits to

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<sup>168</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down sex-based classification in statute concerning military benefits and analogizing sex to race because it frequently bears no relation to ability to perform or contribute to society); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down miscegenation statute as based on invidious racial discrimination violative of the Equal Protection Clause). As *Romer's* invocation of impartiality suggests, the battle for gay and lesbian rights involves, to a significant degree, the proper import of this principle. See *Romer*, 116 S. Ct. 1620, 1623, 1627-29 (1996).

<sup>169</sup> See Steve Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 605-06 (1980) (arguing that an Establishment Clause model for nonreligious speech "would entirely prevent government persuasion or sponsorship of beliefs" and thus "surely would go too far").

<sup>170</sup> See *id.*; *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (stating "[t]hat the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally is clear").

<sup>171</sup> YUDOF, *supra* note 66, at 38-41. But my project here is not to offer a complete account of the contours of permissible governmental speech.

<sup>172</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 847-53 (1992) (upholding a woman's right to decide to terminate her pregnancy as part of due process liberty).

governmental power as well as from a normative conception of the preconditions for human personhood, dignity, self-definition, and "the pursuit of happiness."<sup>173</sup> Contemporary American constitutional law does not fully embrace the blunt proposition of the Wolfendon Report (inspired by Mill) that "[t]here must remain a realm of private morality and immorality which in brief and crude terms is not the law's business."<sup>174</sup> But the notion of a "right to be let alone," a root of the constitutional right to privacy, reflects acceptance of such a jurisdictional argument to a point.<sup>175</sup>

As qualifiers like freedom from "unwarranted" governmental interference and a realm "largely" beyond the reach of government suggest, this protected realm of personal sovereignty is not an absolutely inviolable sphere completely immune from governmental regulation. Rather, delineating the proper business of government and the balance between personal sovereignty and legitimate governmental authority is at the core of constitutional theory and adjudication.<sup>176</sup> Perhaps one reason that it is difficult to translate the jurisdictional argument from the realm of religion to the broader realm of "unusually important" decisions is that it is difficult to argue that it is not government's business how people live because their "sins" have no impact on society.<sup>177</sup> Mill identified the family as properly within the jurisdiction of

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<sup>173</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (linking the right to be let alone to requirements of human happiness); see Dorf, *supra* note 118, at 1188 (discussing the Framers).

<sup>174</sup> H.L.A. Hart, *Immorality and Treason*, in MILL, *supra* note 8, at 246-47 (quoting Wolfendon Committee on Homosexual Offences and Prostitution Report); see *infra* note 180 for discussion.

<sup>175</sup> For invocations of the right to be let alone as a foundation of the right of privacy, see, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). On the influence of Mill's *On Liberty* upon the identification of a constitutional right to privacy, see MARY ANN GLENDON, *RIGHTS TALK* 47-75 (1991).

<sup>176</sup> As the Court has elaborated in substantive due process jurisprudence, when fundamental rights and the realm of constitutionally protected liberty are at stake, persons have protection against "unwarranted" interference, see *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), or (more recently) "unduly burdensome" governmental regulation, see *Casey*, 505 U.S. at 874-79, a compelling governmental interest may override this qualified jurisdictional sovereignty. When fundamental constitutional rights are not at issue, for example, when government passes social or economic legislation, it may pursue "legitimate" governmental ends by means rationally related to those ends. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).

<sup>177</sup> Just as Locke defended religious toleration because of the absence of harm to the commonwealth, Thomas Jefferson expressed such a "no harm" principle in observing that "it does me no injury for my neighbor to say there are twenty gods, or no god." RICHARDS,

government, because parents' breach of their duties threatened their children and society.<sup>178</sup> Today, juxtaposed with the recognition of fundamental constitutional rights concerning family life is the idea that government has proper authority to regulate the family and afford privileged status to the marital (heterosexual) family precisely because of its fundamental importance to a stable society and the harm to children and to society when parents fail in the task of childrearing.<sup>179</sup>

Attempts at linedrawing between governmental and personal sovereignty have been vexed with difficulty. A Millian principle concerning harm to others may work to a degree and, arguably, has played a role in constitutional adjudication concerning the scope of privacy. But its force depends upon the definition of harm and the weight given to arguments about impact upon the moral climate or ethical environment, for constitutional jurisprudence also contains a moralistic strand signalling resistance to any simple linedrawing between public and private behavior that would remove a range of subjects from government's concern.<sup>180</sup> For example, Justice Harlan's famous dissent in *Poe v. Ullman* speaks of government's proper concern for the "moral soundness" of its people.<sup>181</sup> Thus, on the one hand, there is a powerful Millian argument that private, nonconforming consensual sexual conduct (e.g.,

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*supra* note 91, at 112–13.

<sup>178</sup> See MILL, *supra* note 8, at 95–101.

<sup>179</sup> See *Maynard v. Hill*, 125 U.S. 190, 205–06 (1888) (stating deep public interest in marriage because it is the foundation of family and society, civilization, and progress). For contemporary arguments about government's proper interest in averting the political and social consequences due to failings of families, see, e.g., GLENDON, *supra* note 175, at 121–44; GALSTON, *supra* note 36, at 282–89.

<sup>180</sup> Some classic debates over the proper scope of tolerance concern arguments for intolerance, even when no direct harm to the rights of others is involved, because of a right of societal self-protection of its moral code. In the Hart-Devlin debate over the decriminalization of sodomy, Lord Devlin argued that society suffers harm from deviation from public morality (e.g., tolerating sodomy and other forms of sexual "immorality" weakens the moral fabric by threatening traditional sexual morality) and that, in appropriate cases, it may use the criminal law to enforce such morality. See DEVLIN, *supra* note 24, at 7–25. In reply, Hart granted that, in some cases, law must enforce morality, but challenged the claim that consensual, nonconforming sexual behavior threatened to unravel the moral fabric of society: "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty, and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." Hart, *supra* note 174, at 250.

<sup>181</sup> *Poe v. Ullman*, 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting); see also Michael J. Sandel, *Moral Argument and Liberal Toleration*, 77 CAL. L. REV. 521, 526 (1989) (favorably invoking Harlan for his opposition to neutrality).

homosexual sodomy) does not harm the rights of others and does not (as Hart put it) threaten to unravel society's moral fabric<sup>182</sup>—and, indeed, poses far less threat to society than, say, inadequate childrearing practices do. On this view, society's discomfort with or disapproval of such sexual conduct is not a sound basis for governmental regulation.<sup>183</sup> And yet, on the other hand, Harlan included homosexuality as a proper subject of governmental proscription, and the majority in *Bowers v. Hardwick* upheld Georgia's sodomy law on the basis of moral condemnation of homosexuality, notwithstanding Justice Blackmun's poignant invocation of Hart's argument.<sup>184</sup>

An argument for toleration and protection of consensual sexual conduct in the "privacy" of the home is compelling for many persons who believe that government has no "business" regulating what goes on in the bedroom. *Bowers*'s exclusion of homosexual intimate association from that protection was surely wrong for this reason, among others. But the jurisdictional rationale cannot rest solely on a sharp public/private distinction, as though we could divide the world into literally distinct spheres: the private—the home, family, marriage, civil society, and (on some accounts) the market—and the public—politics and (on other accounts) the market. It gives rise to serious misunderstandings about the limits that toleration places upon the proper business of government and it may encourage an interpretation of toleration as empty toleration.

## 2. Avoiding Misconceptions About the Jurisdictional Rationale

### a. Negative Liberty, Private Coercion, and Disempowered Women

Feminists correctly attack an overly literal, spatial notion of privacy to the extent it carries the problematic implication that entire spheres of social life are simply immune from governmental regulation because they are "private" (e.g., the family). The idea that government has "no business" interfering with what goes on in the privacy of men's "castles" and bedrooms, they charge, leads to governmental abdication of responsibility, in the name of "freedom and self-determination," for protecting women and children in the home from abusive exercises of "private" power.<sup>185</sup>

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<sup>182</sup> See Hart, *supra* note 174, at 250.

<sup>183</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 212–13 (1986) (Blackmun, J., dissenting).

<sup>184</sup> See *Poe*, 367 U.S. at 545–46 (Harlan, J., dissenting); *Bowers*, 478 U.S. at 196, 212–13 (Blackmun, J., dissenting).

<sup>185</sup> MacKinnon, *supra* note 141, at 1311.

From this cogent critique of the rhetoric of privacy, some feminists reach the conclusion that this abdication of governmental responsibility is an entailment of a principle of liberal toleration rooted in a jurisdictional argument for a sphere of individual decisionmaking. Thus, they argue, when toleration takes the form of constitutional rights to negative liberty against governmental interference with "private" life, it leaves women vulnerable to that private power.<sup>186</sup> But this view is mistaken, at least on a model of toleration as respect, which does not support an unqualified jurisdictional principle of governmental noninterference with "private" life. It is undeniable that historical doctrines of family privacy and of the sanctuary of the marital bedroom have contributed to the unequal protection of married women in their homes and sanctioned enormous injustice against women and children within the family, leaving them unprotected against rape, incest, and physical assault within the family and without legal rights of bodily integrity.<sup>187</sup> However, to the extent feminist critiques of privacy and toleration indict constitutional rights of privacy as literally sanctioning violence against women under the rubric of privacy, they are wrong, because constitutional privacy precedents have facilitated, rather than thwarted, the erosion of these doctrines.<sup>188</sup>

The critical point here is that government properly exercises its jurisdiction to protect persons against harm and to adjudicate among competing rights.<sup>189</sup> To the extent feminist critics attack the Constitution as fundamentally flawed because it does not require government to take affirmative measures to protect women against such harms, they target the idea of the "negative Constitution,"

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<sup>186</sup> This is a prominent theme in West's critique of negative liberty and MacKinnon's critique of privacy. See WEST, *supra* note 46, at 105-28; MacKinnon, *supra* note 2, at 193-95; MacKinnon, *supra* note 141, at 1311-13.

<sup>187</sup> For a recent argument about the lingering impact of marital privacy doctrine on the law's treatment of violence against women, see Reva B. Siegel, "The Rule of Love": *Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

<sup>188</sup> See Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995) (discussing use of privacy precedents in state law cases striking marital rape exemptions). See also *Planned Parenthood v. Casey*, 505 U.S. 833, 896-98 (1992) (rejecting common law understandings of marriage and a husband's prerogatives as incompatible with current understandings of individual liberty; striking spousal notification requirement in abortion law).

<sup>189</sup> For example, Mill expressly excluded from the proper sphere of "liberty" a husband's unequal power over his wife and condemned the laws permitting such power. See MILL, *supra* note 8, at 96-97; JOHN STUART MILL, *The Subjection of Women* (1869), in JOHN STUART MILL & HARRIET TAYLOR MILL, *ESSAYS ON SEX EQUALITY* 137 (Alice S. Rossi ed., 1970). For Rawls's similar rejection of such private power, see *infra* text accompanying notes 330-33.



not toleration or privacy.<sup>190</sup> A model of toleration as respect, which assumes a basic governmental responsibility to facilitate persons' capacity for self-government, does not entail this idea, but supports interpreting the Constitution as not only permitting but in some instances requiring such governmental responsibility.<sup>191</sup> Support for a jurisdictional principle of personal sovereignty is compatible with such an interpretation, as a considerable body of liberal constitutional scholarship indicates.<sup>192</sup> The equal citizenship of women is not only a constitutional principle but also a basic public value, which government should take measures to secure.

A model of toleration as respect, rooted in part in the jurisdictional rationale, usefully builds on core liberal and feminist principles, such as a commitment to democratic and personal self-government and to equality. However, as noted in Part II, some perfectionist feminists part company with liberals in calling into question the value of toleration itself, or rather its relevance to what women need. They charge that liberal toleration's focus upon the threat of coercion by government, or public power, misses the point because it is private power that poses the greater threat to women's living good, self-directed lives. Why focus on protection against government when feminists need government to work for them to advance women's equal citizenship and well-being?

I believe that the better feminist argument is that the negative liberty, or freedom from governmental interference, secured by toleration is a necessary

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<sup>190</sup> See, e.g., WEST, *supra* note 46, at 105–28. For a defense of privacy or autonomy against such charges, see Fleming, *supra* note 6, at 46–48.

<sup>191</sup> As the scholarship on the idea of the enforcement of the “Constitution outside the courts” suggests, legislatures should play a vital role in discharging such responsibility. See, e.g., SUNSTEIN, *supra* note 141, at 9–10; WEST, *supra* note 46. Congress's passage of the Violence Against Women Act of 1994 (“VAWA”), 42 U.S.C. §§ 13931–14040 (1994), is a good example of invoking its constitutional authority to secure women's equal citizenship and protection from private violence. But see Siegel, *supra* note 187, at 2174–2205 (arguing that legacy of family privacy doctrines limits efficacy of VAWA).

<sup>192</sup> See SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* (1993); CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION* (1993); TRIBE, *supra* note 141, at §§ 15–1 to 15–21; Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). Cass Sunstein criticizes the idea of rights to liberty rooted in substantive due process, and instead argues for the obligation of the legislative branch to enforce equality rights derived from an anticaste interpretation of the Equal Protection Clause. See SUNSTEIN, *supra* note 141. Some scholars would look to the legislatures, rather than the courts, to discharge these obligations. See *id.*; Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

but not a sufficient condition of women's well-being.<sup>193</sup> The feminist claim that government may and should further women's autonomy is persuasive. A commitment to toleration as respect supports the use of governmental power to address coercive private power and the recognition of governmental duties to advance women's equality and autonomy, for example, through limiting "liberty" by such means as antidiscrimination laws.<sup>194</sup> But it is simply not credible to suggest that a jurisdictional principle is almost irrelevant because governmental power does not pose a significant threat to women's pursuit of self-governing lives. Feminist investigation of women's lives itself suggests the need for a two-pronged focus upon both the benign and the harmful aspects of governmental power. Surely, governmental power does pose a threat to the reproductive health and well-being of pregnant women who are poor and the targets of unequal funding for childbirth and abortion; or to lesbians precluded from marrying and subjected to discrimination in custody determinations and in public employment by restrictive state and federal laws; or to women on public assistance subject to harsh restrictions and requirements, reflecting public sentiments about their reproductive irresponsibility; or to communities of color living in poor urban environments, whose lives are made worse due to the high level of arrest and incarceration of men of color in a criminal justice system prone to institutional racism.<sup>195</sup> One may acknowledge that many sources of private power impinge upon and constrain women's ability to act as agents in their own lives and to live good lives without dismissing the specter of coercive state power as a liberal bogeyman.

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<sup>193</sup> For this reason, I believe that Robin West's work usefully highlights government's obligation to foster women's positive liberty, but fails to put sufficient value upon negative liberty. For examples of the approach to liberty argued for in text, see ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203 (R. Bruce Douglass et al. eds., 1990); Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407 (1992).

<sup>194</sup> This is not to deny that the rhetoric of "toleration," "liberty," and "privacy" features in efforts to thwart governmental intervention into exercises of private power to bar discrimination on the basis of race, sex, and, more recently, sexual orientation. See, e.g., Brief for Petitioners, in *Romer v. Evans*, 116 S. Ct. 1620 (1996) (asserting that Colorado's Amendment 2 advanced legitimate state interests in privacy and religious liberty).

<sup>195</sup> On restrictive abortion laws, see *supra* Part III.C. For some feminist work on the issues raised in text, see, e.g., KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW* (2d ed. forthcoming 1998); WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (1997).

b. *Empty Toleration and Second-Class Citizenship*

A second misconception arising from an overly literal or spatial understanding of a public/private justification for the jurisdictional argument is that it leads to no better than a model of empty toleration, both in the attitudes such toleration engenders and the latitude it allows for governmental moralizing. For example, Sandel critiques a version of the jurisdictional argument for toleration of homosexual intimate association to the extent it rests upon the private nature of the sexual conduct, regardless of its moral worth. He contends that tolerating something so long as it is private makes for very tenuous protection because it suggests that (like obscenity) homosexual intimate association is base and degrading, permissible only so long as it is hidden.<sup>196</sup> Further, other critics of liberal toleration claim that decriminalizing nonconforming, consensual sexual conduct (such as homosexual sodomy) on the rationale that it takes place in the private realm, and thus does no real harm, has left persons who engage in such conduct in a status of second-class citizenship. They are permitted to practice "private" sexual acts, but face legal sanction for any spillover or manifestation of their nonconformist (e.g., gay or lesbian) identity into the public sphere, thus constraining their ability to shape the public culture.<sup>197</sup>

Indeed, Justice Scalia's dissent in *Romer*, which views toleration as fully compatible with public and private discrimination against gay men and lesbians, contemplates this sort of empty toleration. Scalia interpreted Colorado's Amendment 2 (which barred gay men, lesbians, and bisexuals from the protection of antidiscrimination law) as a lawful expression of "moral and social disapprobation of homosexuality" by "seemingly tolerant Coloradans" who were "*entitled* to be hostile toward homosexual conduct."<sup>198</sup> Some contemporary arguments in favor of discrimination against gay men and lesbians and against same-sex marriage argue for this form of "tolerance": there may be prudential arguments against using the criminal law to condemn sexual immorality, but society must not let its laws go beyond tolerance to signal acceptance and condonation of such conduct.<sup>199</sup> Otherwise, decriminalization of formerly proscribed conduct may send a message that

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<sup>196</sup> See SANDEL, *supra* note 3, at 107.

<sup>197</sup> See Backer, *supra* note 18.

<sup>198</sup> *Romer v. Evans*, 116 S. Ct. 1620, 1633 (1996) (Scalia, J., dissenting).

<sup>199</sup> See, e.g., John Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1049-55 (1994) (discussing the European "standard modern position" of legal regulation of various sexual conduct).

immoral behavior is now condoned because it is no longer punished.<sup>200</sup>

I vigorously dispute Scalia's assertion that decriminalizing sodomy exhausts the requirements of toleration, and that governmental discrimination against gay men and lesbians is consistent with toleration. This is indeed a "perverse" view of toleration<sup>201</sup>—a model of toleration as respect does not lead to these consequences. The jurisdictional argument calls for the extension to gay men and lesbians of the same basic liberties accorded to other citizens, pursuant to respect for their moral powers and their right to a realm of personal sovereignty. Denying gay men and lesbians the basic civil right of marriage refuses to accord to them the decisional sovereignty concerning their intimate lives and family arrangements reserved to other citizens by the Constitution. Within the cluster of due process liberty is the freedom to marry, a basic civil right, one of those "unusually important personal decisions" allocated to the individual instead of the state.<sup>202</sup>

Similar to Scalia, opponents of same-sex marriage maintain that the denial of the right to marry satisfies the requirements of tolerance, as distinguished from "acceptance."<sup>203</sup> Denying gay men and lesbians such a right may satisfy a model of empty toleration (although even that is debatable),<sup>204</sup> but it fails the requirements of toleration as respect. It fails to afford respect to the equal moral powers and dignity of gay men and lesbians and denies to them "the right to name, let alone claim, the intimate life that is the basic human right of all other persons."<sup>205</sup> It precludes their ability to legitimize their intimate relationships through civil marriage, a relationship regulated and recognized by the state and

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<sup>200</sup> Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in part, dissenting in part) (describing the "natural," although inaccurate, view that "if the Constitution guarantees abortion, how can it be bad?").

<sup>201</sup> The reference is to the title of Backer's article, *supra* note 18.

<sup>202</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see also *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>203</sup> For the invocation by opponents of the right to same-sex marriage of the toleration/"forced" acceptance distinction, see Gary Bauer, *Takeover, Not Tolerance, Is the Homosexual Agenda, but Marriage Is Not for Sale*, PR NEWswire, June 24, 1996 (remarks by president of Family Research Council on the Defense of Marriage Act); 142 CONG. REC. H7487 (daily ed. July 12, 1996) (statement of Rep. Funderburk) (arguing that the Defense of Marriage Act protects against government-mandated acceptance of same-sex marriages).

<sup>204</sup> It is arguable that the denial of the right to marry fails even an empty toleration model. The comparison with selective funding of the right of abortion is instructive: here, government is not simply discouraging one choice (same-sex marriage) by favoring an alternative choice (heterosexual marriage); it refuses outright to recognize any right of gay men and lesbians to marry.

<sup>205</sup> RICHARDS, *supra* note 9, at 353.

a source of many rights, responsibilities, and benefits.<sup>206</sup> In so doing, government denies them equal access to cultural resources important to the development and expression of identity and exercise of their moral powers.<sup>207</sup>

Toleration as respect requires that to impinge upon or deny such a right to a group of citizens, or to burden its exercise, government must satisfy a heavy burden of justification. Without mentioning *Bowers*, the Court's more recent foray into the question of the constitutional rights of gay men and lesbians, *Romer v. Evans*, goes some distance toward recognizing this governmental burden of justification by suggesting that a defense of discrimination on the basis of sexual orientation as governmental moralizing to reflect public disapproval of homosexuality fails as unjustified animus, and a bare desire to harm.<sup>208</sup> In stating that the Constitution does not tolerate making a class of citizens strangers to the law and that Amendment 2 violated the requirement that government be impartial, Justice Kennedy in effect made a jurisdictional argument that sexual orientation is an irrelevant characteristic with respect to citizens' ability to seek the protection of the law. A conservative or "minimalist" reading of *Romer* is that it simply prohibited sweeping, categorical exclusions against gay men and lesbians and left open the question of the constitutionality of more narrowly-tailored measures distinguishing between gay men and lesbians and other citizens.<sup>209</sup> A more far-reaching interpretation of *Romer*, which would advance a model of toleration as respect, is that principles of impartiality and Equal Protection forbid government to legislate the denial of civil rights and basic rights of conscience based on the private prejudices or animus of citizens, and that the uncritical invocation of historical and contemporary moral condemnation of homosexuality reflects such animus (indeed, an unjust and intolerant gender orthodoxy), rather than principled reason-giving.<sup>210</sup> As such, *Romer*, along with the recent Hawaii decisions striking Hawaii's bar on same-sex marriage, may be significant turning points

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<sup>206</sup> See *Baehr v. Lewin*, 852 P.2d 44, 58-59 (Haw. 1993).

<sup>207</sup> See RICHARDS, *supra* note 9, at 365-66. For a similar argument made from a perfectionist liberal framework, see Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997).

<sup>208</sup> 116 S. Ct. 1620, 1627 (1996).

<sup>209</sup> See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 3, 53-71 (1996).

<sup>210</sup> See *Shahar v. Bowers*, 1997 U.S. App. LEXIS 13069, \*73 (11th Cir. May 30, 1997) (Kravitch, J., dissenting); *Shahar*, 1997 U.S. App. LEXIS at \*85 (Birch, J., dissenting); *Able v. United States*, 1997 U.S. Dist. LEXIS 9391 (E.D.N.Y. July 2, 1997). For an argument that antigay/lesbian initiatives reflect an unjust gender orthodoxy and are an invidious form of religious intolerance, see RICHARDS, *supra* note 9, at 383-410.

in a history of judicial failure to engage in any but the most conclusory review of the reasons offered for the denial of basic rights and liberties to gay men and lesbians.<sup>211</sup>

*c. Toleration as Respect and the Parameters of the Jurisdictional Argument*

A model of toleration as respect suggests that an alternative way to think of the jurisdictional argument, which avoids the problems flowing from an overly sharp public/private distinction, is that it secures a metaphorical space for, and a presumption of an entitlement to, decisional sovereignty. Dictating certain types of important personal decisions is simply not the proper business of government, even if those decisions have public manifestations and consequences for society. As one liberal constitutional argument puts it, certain conduct is properly called private “because its centrality to moral independence requires . . . that it not be in the sphere of public concern.”<sup>212</sup> So understood, the jurisdictional argument defends a realm of personal autonomy and sovereignty (or deliberative autonomy) with respect to certain significant decisions and, while there is not an absolute immunity from governmental regulation, government’s burden of justification is higher when such rights are at issue. Thus, a constitutional democracy affords protection to certain “unusually important” decisions that relate to a person’s conception of and pursuit of a good life, but it does not follow that government has no jurisdiction whatsoever to regulate “private” life.

Toleration as respect suggests that what delineates government’s legitimate authority from impermissible intrusion into personal sovereignty is the purposes

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<sup>211</sup> With the exception of the Hawaii decision of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), every court that has considered a challenge to state marriage statutes construed to prohibit same-sex marriage has rejected it. One rationale has been a definitional argument: marriage, implicitly, has always been the union between a man and a woman. A second is an incapacity argument: because the bearing and rearing of children is a central reason for government’s recognition of marriage, a same-sex couple simply is incapable of participating in a marriage. See, e.g., *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974) (using definitional and incapacity arguments); ESKRIDGE & HUNTER, *supra* note 195, at 799–805 (identifying and critiquing use of these arguments in case law). Akin to *Bowers*, both of these arguments appeal to millennia of history, moral teaching, and tradition. Under a strict scrutiny test, *Baehr v. Lewin* correctly rejected such arguments as “circular, and unpersuasive” and instead found that a bar on same-sex marriage constituted sex discrimination. *Baehr*, 852 P.2d at 61. In Part V, I offer arguments for same-sex marriage, but a full discussion of judicial rejection of challenges to state laws barring such marriage is beyond the scope of this Article.

<sup>212</sup> RICHARDS, *supra* note 91, at 244.

for which government acts. It is obvious that government properly acts to protect persons from violence and sexual assault in the home to honor its obligation to protect citizens from attacks on their bodily integrity and liberty and to maintain social order and peace. Similarly, government properly acts to shape citizens' capacity for democratic self-government and to foster virtues of citizenship. It is not obvious that personal decisions about what to believe and how to have sex bear a sufficient link to government's proper ends to justify regulation. One might argue that here government exceeds its authority, and acts *ultra vires*.<sup>213</sup>

With this conception of the jurisdictional argument undergirding toleration as respect in mind, I now turn to assess *Casey* for its treatment of the protection of a realm of decisionmaking as compatible with governmental persuasion in favor of one choice rather than another. *Casey* usefully poses the questions of just how inviolate the sphere of liberty "promised" by the Constitution is and for what purposes government may seek to steer citizens' exercise of that liberty. Looking at the conflicting approaches to informed consent schemes within the Court's abortion jurisprudence, I address these questions as posing an interpretive conflict as to the scope of the jurisdictional principle required by a model of toleration as respect. I criticize *Casey* as failing to meet a model of toleration as respect, notwithstanding its rhetoric of fostering women's "wise exercise" of their reproductive liberty. Using Dworkin's analysis of *Casey* as a point of departure, I consider whether toleration as respect could or should embrace the use of governmental persuasion to foster women's reproductive autonomy.

### C. *What Does Toleration as Respect Require?: The Informed Consent Cases and the Idea of Governmental Moralizing to Facilitate Women's Reproductive Autonomy*

To a point, constitutional abortion jurisprudence embraces the jurisdictional argument for toleration. The most basic jurisdictional linedrawing between government and individual women is at the point of viability: the Court has held, in effect, that it is the proper business of government to regulate abortion, even to the point of proscription, at viability because of government's compelling interest in protecting potential life (at this point, arguably a public value rather than a sectarian value).<sup>214</sup> But does an entitlement to be free from

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<sup>213</sup> I am grateful to Professor Benjamin Zipursky for helpful discussion of the ideas in this paragraph.

<sup>214</sup> See *Roe v. Wade*, 410 U.S. 113, 162–64 (1973).

governmental proscription prior to viability carry with it an entitlement to be free from governmental moralizing against abortion?

The *Casey* joint opinion espouses the jurisdictional rationale to some extent, affirming that: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." It further states: "The destiny of the [pregnant] woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>215</sup> Later, the joint opinion refers to the "urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty."<sup>216</sup>

However, the jurisdictional model that the joint opinion embraces in *Casey* is not one of an inviolate sphere of decisionmaking prior to viability, but one of shared jurisdiction or sovereignty between a pregnant woman and the government. So long as the woman is free to make the "ultimate decision" prior to viability, the government may legitimately share the territory to facilitate "wise exercise" of reproductive liberty through measures designed to persuade her in favor of childbirth.<sup>217</sup> The joint opinion contended that this conception of decisionmaking properly followed from *Roe*, and overruled "progeny" of *Roe* affording greater inviolability to a woman's decisionmaking process prior to viability and rejecting governmental steering against abortion because it invaded that territory.<sup>218</sup> The joint opinion instead insisted on shared jurisdiction from the commencement of pregnancy, on the logic that it is government's proper business to advance its "profound" interest in protecting prenatal life.

*Casey* grounds governmental authority to place some limits upon women's liberty in the "unique" nature of abortion and its consequences: abortion involves the termination of potential life and has consequences for persons other than the pregnant woman as well as for the fetus. The Court's invocation of the consequences of an abortion suggest in part a paternalistic argument for regulation (e.g., negative consequences for the woman who chooses abortion, whose decision may be poorly informed because she lacks information about the impact of abortion on the fetus), in part a moral climate argument (e.g., consequences for medical personnel who perform abortions and members of

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<sup>215</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 847, 852 (1992).

<sup>216</sup> *Id.* at 869.

<sup>217</sup> *Id.* at 877-78, 887.

<sup>218</sup> *See id.* at 882-83 (overruling in part *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983)).



society who must live with the knowledge that abortions occur), and in part a harm argument (e.g., “depending upon one’s beliefs,” the consequences for the fetus).<sup>219</sup> Mapping this cluster of consequences onto the two recognized governmental interests, protecting potential life and maternal health, the joint opinion builds into protecting maternal health a governmental concern for women’s psychological well-being and their making “wise” decisions.

The *Casey* joint opinion concludes that persuasion in favor of childbirth, under the guise of informed consent, not only protects potential life but also fosters women’s well-being. Governmental persuasion allegedly helps women not simply to choose, but to choose well. As a useful point of comparison, in the selective funding and facilities cases, there was no autonomy-enhancing justification or any credible argument that such restrictions fostered women’s well-being (nor, as I have argued, could there have been); governmental sidetaking in favor of childbirth found justification in the government’s interest in protecting potential life. Although *Casey* draws upon those cases to support its use of the undue burden standard, it appears to build into that test a requirement that steering against abortion must not impair women’s self-government—arguably, a step beyond empty toleration toward toleration as respect. The joint opinion upholds informed consent measures designed to further government’s interest in childbirth on the assumption that they inform, rather than hinder, women’s “free choice”: they promote women’s psychological well-being and facilitate the “wise exercise” of their liberty.<sup>220</sup> Yet, in equating governmental steering with fostering women’s self-government, *Casey* contrasts with the strikingly different model of self-government found in the Court’s earlier informed consent jurisprudence.

### 1. *Is There a Right to Be “Insulated”?*

Prior to *Casey*, the Court struck down informed consent schemes to the extent that, under the guise of informed consent, the state sought to “wedge” its “message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician” and to induce women to withhold their consent altogether.<sup>221</sup> The Court envisioned an inviolate sphere within which women (in consultation with, and as informed by, their physicians) should be free of governmental moralizing against abortion. Although the state could properly seek to insure that a woman’s choice was

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<sup>219</sup> *Id.* at 852.

<sup>220</sup> *See id.* at 877, 887.

<sup>221</sup> *Thornburgh*, 476 U.S. at 760–62; *see also Akron*, 462 U.S. at 423–24, 444–45.

informed and made with awareness of all the relevant information, the physician was not the state's agent, who must give pregnant women a list of "information" aimed at promoting childbirth (much of it with dubious medical foundation).<sup>222</sup> The Court in *Thornburgh v. American College of Obstetricians and Gynecologists* characterized the "decision to terminate a pregnancy" as "an intensely private one"—"basic to individual dignity and autonomy"—that "may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."<sup>223</sup> As Justice Stevens construed *Roe*, that case rested upon a jurisdictional principle that regards affording individuals "the right to make decisions that have a profound effect upon their destiny" as more important than preventing "incorrect decisions."<sup>224</sup>

In contrast to this more inviolate model of decisional sovereignty, the joint opinion in *Casey* offered the following conception of the woman's decisional right:

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.<sup>225</sup>

The joint opinion further indicated that the state may encourage a pregnant woman "to know that there are philosophic and social arguments of great weight" in favor of continuing her pregnancy.<sup>226</sup>

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<sup>222</sup> Such statutes required, e.g., that women be informed of such "information" as negative psychological and physical consequences of abortion and the status of "the unborn child" as "a human life from the moment of conception." *Thornburgh*, 476 U.S. at 760, 762; *Akron*, 462 U.S. at 423-24, 444-45.

<sup>223</sup> 476 U.S. at 766, 772. In *Roe v. Wade*, the Court located a woman's abortion decision within the constitutional right of privacy, yet it stressed primarily the privacy of the physician-patient relationship and the right of the responsible *physician*, in consultation with the pregnant patient, to decide whether abortion was the appropriate medical resolution of her pregnancy. See *Roe*, 410 U.S. 113, 164-66 (1973).

<sup>224</sup> *Thornburgh*, 476 U.S. at 781 (Stevens, J., concurring).

<sup>225</sup> 505 U.S. at 877-78.

<sup>226</sup> *Id.* at 872.

The earlier informed consent cases arguably reflected the judgment that the best way to protect pregnant women's entitlement to decisional privacy was to prohibit any steering of the decisionmaking process prior to viability.<sup>227</sup> In contrast, the *Casey* joint opinion significantly retreats from the "privacy" of that process. It opens the door to governmental persuasion justified as—and conflated with—facilitating the "wise exercise" of women's reproductive choice.<sup>228</sup> Thus, *Casey* overruled *Thornburgh* and similar cases on the permissible scope of informed consent: in those cases, the Court clearly had rejected the conflation of persuading with facilitating autonomous decisionmaking.

Which of these two models of government's proper role in fostering women's reproductive choice is more persuasive? Which better comports with a model of toleration as respect? If, as perfectionist critics of toleration argue, government can do more to foster self-government than simply leave people alone, does *Casey* offer an attractive perfectionist vision?

## 2. *Casey's Perfectionist Vision: Abortion as Psychological Peril*

For the *Casey* joint opinion, "informed" choice means, in effect, that the woman is informed that the state prefers childbirth and has "profound" respect for the fetus. The Pennsylvania statute required that a pregnant woman who requests an abortion be informed of the availability of materials describing "the unborn child," of the existence of agencies that would support a decision for childbirth over abortion, and of the fact that financial assistance from the father of the potential child may be available, and then wait twenty-four hours before implementing a decision to have an abortion.<sup>229</sup> Notwithstanding the Court's lofty reference to encouraging pregnant women to know of "philosophic and social arguments" in favor of childbirth, nothing in the statute before the Court remotely resembles or conveys such arguments, without considerable drawing of inferences (e.g., from anatomical descriptions of the fetus or the names of

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<sup>227</sup> This judgment seems appropriate given the lack of balance in the schemes before the Court and the antiabortion impetus behind such schemes. But it is also understandable why this prophylactic approach drew the charge that the Court ruled out in too categorical a manner any attempt by government, prior to viability, to foster its interest in potential life by regulating the decisionmaking process itself.

<sup>228</sup> This retreat from the privacy of the decisionmaking process may be seen in the Court's general avoidance of privacy rhetoric in *Casey*, in contrast to such cases as *Thornburgh*. See Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 127–33 (1992).

<sup>229</sup> See 505 U.S. at 902–11.

social service agencies).

The crux of *Casey*'s analysis of informed consent is that such measures properly seek to ensure that women considering an abortion understand the "impact on the fetus," which "most women" would deem "relevant, if not dispositive to the decision."<sup>230</sup> This averts the risk that they may later regret their decisions as ill-informed and suffer "devastating psychological consequences," thus protecting women's well-being.<sup>231</sup> Requiring the provision of information about the fetus is a "reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion."<sup>232</sup> The state may simultaneously promote informed choice and steer in favor of childbirth, or "ensur[e] a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."<sup>233</sup>

If we may call this a "perfectionist" vision of fostering women's well-being, its underlying ideology about women's decisionmaking process is that women are at risk for serious psychological consequences from abortion choices because they are ignorant about what abortion is. Without these informed consent procedures, women might terminate pregnancies because they do not understand the anatomical characteristics of the fetus or that abortion has the consequence of terminating fetal life. Despite considerable expenditure of governmental resources to establish this model of abortion as, contrasted with childbirth, fraught with physical and psychological peril for women, this model lacks a solid foundation.<sup>234</sup> To the contrary, most studies suggest that the majority of women mainly feel "relief" after an abortion, and that, although they often experience such feelings as loss, ambivalence, and regret at the time

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<sup>230</sup> *Id.* at 882.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 883.

<sup>233</sup> *Id.* at 882-83.

<sup>234</sup> Indeed, on the belief that women were not being informed of the health effects of abortion, President Reagan directed Surgeon General Everett Koop (who was openly opposed to abortion) to report on such effects. Koop concluded that he could not file a report "that could withstand scientific and statistical scrutiny" and that the psychological effects resulting from abortion are "minuscule from a public health perspective." Koop asserted that he personally had counseled women with "severe psychological problems after an abortion," but that studies were flawed and inconclusive and would not support a scientific report. In Congress, Koop was closely questioned about his characterization of over 270 studies on the health effects of abortion as "flawed." See *Medical and Psychological Impact of Abortion, Hearing Before the Human Resources and Intergovernmental Subcomm.*, 101st Cong., 1st Sess., Mar. 16, 1989 (including Report and testimony of Koop).

(e.g., if the circumstances were different, they would have chosen childbirth), few would reverse their decision; they experience abortion even as a positive decision, an exercise of moral responsibility.<sup>235</sup>

This perfectionist vision rests on an insupportable model of "abortion as trauma" or psychological peril for women. It also does not reflect a balanced approach to the question of what reproductive decisions foster women's well-being. For example, missing is any attempt to inform women concerning the potentially traumatic or perilous effects on their well-being and the life of their future child if they continue unwanted pregnancies and raise unwanted children, or of the consequences of giving up a child for adoption.<sup>236</sup> And far from being uniformly pronatalist, much public opinion and public policy disfavors and penalizes childbirth when women—as many women seeking abortion are—are young, unmarried, and without substantial financial resources. They are branded as immoral and socially irresponsible and their "fatherless" families labeled both a symptom and cause of social pathology.<sup>237</sup> If the goal is facilitating "wise exercise" of reproductive liberty, why not present a more balanced account of the complex moral and social issues?

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<sup>235</sup> See Brief for *Amicus Curiae* American Psychological Association in Support of Petitioners, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), at 21 (citing studies); CAROL GILLIGAN, *IN A DIFFERENT VOICE* 70–105 (1982); PATRICIA LUNNEBORG, *ABORTION: A POSITIVE DECISION* (1992); KATHLEEN McDONNELL, *NOT AN EASY CHOICE* (1984); ROSALIND PETCHESKY, *ABORTION AND WOMAN'S CHOICE* 371–79 (rev. ed. 1990). Undeniably, some women do report negative psychological consequences after an abortion, but they are likely to have had great ambivalence about their decision at the time, or to have suffered emotional and other problems prior to the abortion. See Jane E. Brody, *Study Disputes Abortion Trauma*, N.Y. TIMES, Feb. 12, 1997, at C8 (describing highly religious Catholic women who get abortions). For a dramatic collection of narratives about the consequences of abortion, see DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE* (1987) (recounting stories of members of Women Exploited by Abortion).

<sup>236</sup> For example, the Surgeon General's Report, see *supra* note 234, noted the existence of "well-conducted studies" documenting that children born of an unwanted pregnancy "are more likely to experience detrimental psychosocial development, emotional adjustment problems, and a poorer quality of life than are children born to women who desired or otherwise accepted their pregnancies." *Id.* at 221.

<sup>237</sup> See *Beal v. Doe*, 432 U.S. 438, 455–57 (1977) (Marshall, J., dissenting) (arguing that selective funding "brutally coerce[s] poor women to bear children whom society will scorn for every day of their lives"); Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339, 396–408 (1996) (discussing conflicts between antiabortion policies and condemnation of "irresponsible" reproduction and "fatherless" families in welfare reform). On the labelling of single mothers as deviant and a cause of pathology due to the absence of the father, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

Of course, the *Casey* joint opinion does not defend governmental persuasion solely on the basis of its role in furthering women's health; it also upholds governmental steering because it furthers the government's interest in protecting prenatal life. Thus, an alternative interpretation of the joint opinion's model is that women, not for reasons of their own psychological health, but in the name of encouraging "responsibility," should be required to study fetal development and consider arguments against abortion, on the rationale that choosing to remain uninformed is an evasion of responsibility to the fetus and the community.<sup>238</sup> On this interpretation, a right to make the "ultimate" decision does not confer a right to be "insulated" from society's opposition to abortion.

Does this governmental persuasion, justified as furthering either pregnant women's health or the state's interest in prenatal life, satisfy the requirements of either empty toleration or toleration as respect? As a threshold matter, if the governmental steering approved in *Casey* is tantamount to coercion in its effect, then it would fail the requirements even of empty toleration. There is a plausible argument (embraced by Justices Blackmun and Stevens in *Casey*) that the twenty-four-hour waiting period would be coercive in some circumstances (particularly for poor women, rural women who travelled long distances, and women who would have difficulty explaining their whereabouts) in which it had the practical effect of delaying or preventing abortion.<sup>239</sup> However, while it noted the "troubling" findings below about the burden of these measures on some women, the joint opinion found that they did not satisfy the undue burden standard. Although it left the door open for future as-applied challenges on such grounds, generally such informed consent procedures have survived scrutiny under the "undue burden" standard.<sup>240</sup>

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<sup>238</sup> See Robin West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 HASTINGS L.J. 961 (1994) (interpreting *Casey* as a move toward requiring women's reflection on their responsibilities); see also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (arguing that European abortion law, as contrasted with American abortion law (prior to *Casey*), stresses women's responsibility to the fetus and the community).

<sup>239</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 920-21 (1992) (Stevens, J., dissenting in part, concurring in part) (invoking findings of district court as to "severity of the burden" on many women); *id.* at 937-38 (Blackmun, J., dissenting in part, concurring in part) (characterizing statute as "compelled information" and invoking district court findings concerning "especially significant burdens" on rural and other women); Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175, 236-43 (1992) (discussing coercive aspects of the statute).

<sup>240</sup> See *Casey*, 505 U.S. at 885-87. The Court declined to review an unsuccessful challenge to Mississippi's informed consent law. See *Barnes v. Moore*, 970 F.2d 12 (5th Cir.

Assuming *arguendo* that such measures fit the empty toleration model, what about toleration as respect? I assess the merits of two answers to this question: Justice Stevens's conception of equal respect, reflective of the Court's earlier, more inviolate model of decisional autonomy, and Dworkin's model of government fostering "responsibility" in decisions about abortion, which appears to permit persuasion against abortion.

### 3. *Stevens's Model of Deliberative Autonomy and Equal Respect*

In his partial dissent in *Casey*, Justice Stevens offers an equal respect model of the requirements of toleration, which enlists both the idea of moral insult and a principle of sex equality. He contends that the scheme before the Court in *Casey*, by requiring women to reconsider their decision at a point after they have already indicated a choice of abortion, denies them "equal respect." Instead, the statute reflects either "outmoded and unacceptable assumptions about the decisionmaking capacity of women" or the "illegitimate premise" that "the decision to terminate a pregnancy is presumptively wrong."<sup>241</sup> By forcing a woman who, "in the privacy of her thoughts and conscience," has decided to have an abortion to reconsider "simply because the State believes she has come to the wrong conclusion" is a denial of the "equal dignity" which is part of constitutional liberty.<sup>242</sup>

Justice Stevens's analysis suggests that a toleration as respect model should reject one-sided informed consent requirements because they rest upon an impermissible gender ideology or orthodoxy. As some feminist scholars elaborate, the fact that government employs persuasion to steer the exercise of women's deliberative autonomy concerning reproduction, when it does not generally campaign to convince citizens that "the exercise of a right is a wrong," strengthens the argument that such an ideology is at work,<sup>243</sup> as does

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1992), *cert. denied*, 506 U.S. 102 (1992). For other cases upholding informed consent laws under *Casey*'s test, see, e.g., *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994) (upholding North Dakota statute against facial challenge and concluding that factual record was insufficient to demonstrate undue burden); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1488-90 (D. Utah 1994) (upholding Utah statute against facial challenge).

<sup>241</sup> 505 U.S. at 918-19 (Stevens, J., dissenting in part, concurring in part). For an elaboration of the history of such assumptions, see Cohen, *supra* note 239.

<sup>242</sup> 505 U.S. at 919-20 (Stevens, J., dissenting in part, concurring in part).

<sup>243</sup> See Cohen, *supra* note 239, at 222-31, 234-35 (discussing noninterference with voting, religion, marriage, and, to a lesser degree, the right to bear arms). However, recent legislative efforts to encourage greater responsibility in entering into and exiting marriage suggest growing interest in using noncoercive governmental means to steer the exercise of

the joint opinion's embrace of the abortion as psychological peril model. Stevens's jurisdictional argument for toleration suggests that protecting women's decisional authority to make "such traumatic and yet empowering decisions"—an element of "basic human dignity"—is a principle or moral value more important than ensuring that they make what government considers to be the "right" choice, that is, childbirth.<sup>244</sup> In contrast, the joint opinion protects the right to make the "ultimate" decision, but places greater value on women factoring in government's preference (thus fostering their "wise" choice), than on affording them an inviolate decisional process.

At the same time, Stevens's model of equal respect does not require a wholly inviolate sphere: government need not be neutral as between childbirth and abortion, but may promote its preference for childbirth by selectively funding it, creating and maintaining alternatives to abortion, and espousing the virtues of family.<sup>245</sup> Stevens dissented in *Harris*, because the restriction applied to medically necessary abortions, but not in *Maher*, which upheld funding restrictions for elective abortions. How could he simultaneously uphold an image of a sacrosanct decisionmaking process while allowing unequal subsidies aimed at shaping that process? For Stevens, the crucial point appears to be a procedural one: government may moralize against abortion in a number of ways, but "[d]ecisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best."<sup>246</sup> This suggests that Stevens and some other members of the Court have been more likely to see unwarranted interference when it is "internal" to or "injected into" informed consent itself, than when it takes the form of an "external" constraint such as lack of funding, for which government supposedly has no responsibility. If so, this suggests the inadequate model of autonomy at work in the Court's abortion jurisprudence, even among some justices who strongly embrace a jurisdictional argument for autonomy.<sup>247</sup>

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rights. See Hara Estroff Marano, *Rescuing Marriages Before They Begin*, N.Y. TIMES, May 28, 1997, at C9; Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bonds*, N.Y. TIMES, June 24, 1997, at A1.

<sup>244</sup> See 505 U.S. at 916 (Stevens, J., dissenting in part, concurring in part).

<sup>245</sup> See *id.*

<sup>246</sup> *Id.* Stevens distinguishes, as permissible, government taking steps to ensure that a woman's choice is "thoughtful and informed." *Id.*

<sup>247</sup> It is also possible that what is at work is a commitment to the idea of the negative Constitution expressed in *Maher* and *Harris*, or the idea that constitutional rights do not imply affirmative governmental obligations either to facilitate exercise of them or to do so evenhandedly. Unlike Justice Stevens, Justices Blackmun, Brennan, and Marshall consistently opposed selective funding and slanted informed consent schemes. To the extent that the



Justice Stevens's model offers cogent reasons for resisting *Casey*'s equation of facilitating responsible decisionmaking with persuasion against a protected choice. To the extent that Stevens's conception of equal respect finds some selective funding permissible, it departs from the model of toleration as respect. But another objection is that his championing of the lone individual deciding in defiance of the sovereign leaves women too much alone. If government, as perfectionists contend, can do more to foster autonomy than merely leaving persons alone, what might such an autonomy-enhancing jurisprudence look like? Dworkin's model of toleration argues against selective funding and in favor of governmental persuasion that fosters reflective decisionmaking. Is this a better model?

#### *4. Does Equal Respect Rule out Governmental Moralizing?: Dworkin's Model of Toleration of "Procreative Autonomy"*

As discussed above, Dworkin is a frequent target of perfectionist criticism: by espousing liberal "neutrality," with its requirement of equal concern and respect, he would unduly constrain government from pursuing perfectionist goals. Equal respect might seem to require that government attempt, in a "neutral" fashion, simply to ensure that persons have the capacity to form and act upon their own conceptions of the good; it should not steer choice, but must accord equal respect to every choice, even ones that it deems wrong and morally unworthy. To the extent that governmental persuasion against abortion reflects the majority's value judgment that childbirth is preferable to abortion, one might expect Dworkin's analysis of informed consent to resemble that of Justice Stevens, rather than that of the joint opinion in *Casey*.

Dworkin's more recent work, including his analysis of abortion, suggests that this reading of the requirements of equal concern and respect is too strong. The reading is correct to the extent that Dworkin argues that government may and should act to facilitate democratic and personal self-government. In this respect, his critics are wrong that his liberalism allows no room for a formative project. In his recent book, *Freedom's Law*, Dworkin writes:

A genuine political community must be a community of independent moral agents. It must not dictate what its citizens think about matters of political or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own

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internal contradiction between the funding and the informed consent cases derives from shifting majorities on and the changing composition of the Court, *Casey* resolved the contradiction by bringing the informed consent cases into harmony with the funding cases.

reflective and finally individual conviction.<sup>248</sup>

This passage suggests that a commitment to equal concern and respect does not preclude government engaging in a formative project. To the contrary, Dworkin identifies governmental responsibility to undertake a formative project to facilitate independent moral agency, or autonomous, reflective decisionmaking.

In contrast to his earlier emphasis upon liberal neutrality, Dworkin's model of liberalism emphasizes a central principle or value of ethical individualism, or the idea that persons have the right and nondelegable responsibility to decide for themselves what it means to accept the challenge of living their lives well.<sup>249</sup> Such a model treats reflective self-government, understood as ethical agency and moral independence, as a good that government should foster. The ideal is not simply autonomy in the minimal sense of government leaving persons alone, but rather in a richer sense of government fostering reflective and deliberative self-government, or the ability to "choose well."<sup>250</sup> As such, it is a useful example of how a toleration as respect model entails a formative project.

At a minimum, Dworkin's abstract formulation of government's responsibility appears to evince a procedural concern: the political process, for example, should be structured to encourage participation by citizens as active agents in a collective debate.<sup>251</sup> Yet the duty to facilitate moral agency could also extend to more substantive obligations to secure preconditions for democratic and personal self-government and to facilitate the development of persons' capacities and moral powers.<sup>252</sup> As Dworkin's own work suggests, such a duty could encompass such measures as providing good quality public education and opportunities for higher education, funding the arts, supporting affirmative action, and redistributing wealth to provide equality of resources as

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<sup>248</sup> RONALD DWORKIN, *FREEDOM'S LAW* 26 (1996).

<sup>249</sup> See Dworkin, *supra* note 28, at 16–22, 55–57 (elaborating "challenge model" of ethics as basis of liberalism).

<sup>250</sup> See Nussbaum, *supra* note 193 (arguing for the importance of a governmental role in moving citizens "across the threshold into capability to choose well").

<sup>251</sup> See Ronald Dworkin, *The Roots of Justice* 47–48 (unpublished manuscript dated Aug. 28, 1997, presented in Colloquium on Law, Philosophy, & Social Theory, New York University School of Law, on file with author).

<sup>252</sup> For other examples of liberal theories that posit governmental responsibility to shape citizens' capacities for self-government, premised in part on a conception of equal respect, see YUDOF, *supra* note 66, at 20–37; Gardbaum, *supra* note 36, at 413.

a matter of justice.<sup>253</sup>

Does government's responsibility to encourage reflective agency extend to its promotion of some exercises of such agency over others? Dworkin's model of ethical individualism embraces the anti-compulsion rationale for toleration: it protects the right of individuals to be free from government dictating an orthodoxy and infringing upon their responsibility to decide, "finally," for themselves matters of personal ethics and values. Ethical individualism also rests upon a jurisdictional rationale: because individuals are independent moral agents with the responsibility to live their lives well, they are the proper locus of decisionmaking. But the claim that beliefs should be a matter of "finally individual" conviction signals a rejection of an entitlement to a wholly inviolate decisional sphere, within which government may make no effort to structure or shape decisionmaking.

What is notable in Dworkin's recent argument concerning the relevance of liberal toleration to abortion and euthanasia is his exploration of how government may seek to structure the decisionmaking process to encourage "responsibility" and to protect what he calls "intrinsic values" and the ethical environment (or moral climate).<sup>254</sup> Dworkin grounds the right to abortion on a moral and constitutional right to procreative autonomy rooted in the First and Fourteenth Amendments. He argues that the Court in *Roe* correctly concluded that fetuses are not constitutional persons, and that we would better understand the public controversy over abortion as not about the personhood of fetuses, but instead about how best to respect the intrinsic value of the sanctity of life (or,

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<sup>253</sup> Dworkin argues that liberal equality, if not constitutional principles, require most of these preconditions. See DWORKIN, *supra* note 38, at 221–33, 293–331 (defending governmental funding of the arts and affirmative action); Ronald Dworkin, *What Is Equality? Parts 1 and 2*, 10 PHIL. & PUB. AFF. 185, 283 (1981) (elaborating economic theory of justice calling for wealth redistribution); Ronald Dworkin, *Will Clinton's Plan Be Fair?*, N.Y. REV. BOOKS, Jan. 13, 1994, at 20 (arguing for collective provision of some level of health care). Dworkin argues that, although his theory of liberalism requires substantial redistribution of wealth, his interpretation of the Constitution would not support reading it as stipulating a degree of economic equality as a constitutional right. DWORKIN, *supra* note 248, at 36. In so facilitating, government obviously promotes some values (such as liberal principles of equality, diversity, and moral independence) and exercises some selection. On the example of governmental funding of the arts, see also Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350 (1991).

<sup>254</sup> Dworkin argues that government's authority to protect the sanctity of life is "detached," rather than "derivative." That is, it does not derive from the rights of particular persons (such as a right to life), but from sanctity's intrinsic value apart from such rights (akin to human concern for and governmental protection of the environment and endangered species, and promotion of the arts). See DWORKIN, *supra* note 135, at 11–14, 78–94.

life's inviolable or sacred value).<sup>255</sup> Dworkin's case for toleration rests on the claim that citizens have conscientious disagreement about whether sanctity is best respected in particular circumstances by choosing abortion or by continuing a pregnancy, and that these are essentially "religious" decisions.<sup>256</sup> Individuals have the moral right and responsibility to decide for themselves about the meaning of the sanctity of life.

Accordingly, our constitutional tradition of religious toleration as well as Due Process liberty require that government may not coerce ethical choice about procreation and that the ultimate decision must be left to the individual. He argues that government may not insist upon "conformity," that is, forcing individuals to conform with government's view of the best interpretation of what sanctity requires. However, nothing in the Constitution forbids government from properly insisting upon "responsibility" in decisionmaking, that is, encouraging people to accept that sanctity is a contestable value and to decide reflectively and thoughtfully about what it means.<sup>257</sup> Thus, Dworkin interprets the *Casey* joint opinion's argument that women do not have a constitutional right to be "insulated" from others in making the abortion decision, so long as they are the ultimate decisionmakers, as clearly defining the state's interest in regulating abortion as that of encouraging responsibility.<sup>258</sup>

Dworkin's identification of a proper governmental interest in encouraging responsibility seems both cogent and wholly compatible with the model of toleration as respect that I propose. Government can do more than simply leave people alone, and fostering reflective decisionmaking through making people aware that important, contested values are at stake seems consonant with respect for their moral powers. But Dworkin's analysis of *Casey* suggests that he also supports a more robust state role than facilitation, a hybrid of the coercive one he rejects and the facilitative one he accepts: the state decides through the political process which interpretation of a contestable value is the right one and then *encourages*—rather than *coerces*—everyone to reach the state's conclusion. The crucial point is that government may not force women to "make the decision that the majority, as represented by the legislature, prefers"; short of that, however, "the state may reasonably think . . . that a women tempted to abortion should be at least aware of arguments against it that others in the community believe important and persuasive."<sup>259</sup> Thus, he praises

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<sup>255</sup> See *id.* at 9–28, 109–17.

<sup>256</sup> See *id.* at 154–59.

<sup>257</sup> See *id.* at 151–54.

<sup>258</sup> See DWORKIN, *supra* note 248, at 121.

<sup>259</sup> *Id.*

the joint opinion for its statement that the state can encourage women to know that there are "philosophic and social arguments" against abortion.<sup>260</sup>

Dworkin's account of toleration suggests that equal respect does not rule out moralizing if it is reasonably likely to encourage reflective and responsible decisionmaking. But it would seem more consistent with Dworkin's concern for protecting "finally individual" conviction concerning the best interpretation of a "contestable" value to confine government's role to encouraging persons to see that sanctity is a "contestable" value. If government is taking sides, at least to the extent of exposing pregnant women to arguments against abortion, in what Dworkin considers is an essentially religious dispute, does this run afoul of the requirement that officials not prefer one conception of the good life to another, as well as of the constitutional proscription against even noncoercive governmental persuasion concerning religion?<sup>261</sup> Why would equal concern and respect not be better satisfied by government encouraging citizens to be aware of a range of perspectives concerning a decision for childbirth as well as for abortion?

Three reasons appear to explain Dworkin's support for governmental persuasion and not simply facilitation. First, his account of liberalism holds that citizens can and should "campaign [in politics] for the good," but that principles of liberal equality and toleration require that they eschew the tools of coercion and punishment.<sup>262</sup> Dworkin regards it as an insult to human dignity—and to ethical individualism—when government forces a pregnant woman to decide in conformity with an "official interpretation" (i.e., orthodoxy) of the intrinsic value of life,<sup>263</sup> but, like Raz, appears to reject Waldron's charge that even noncoercive steering is a moral "insult." Dworkin's distinction between compulsion and persuasion suggests common ground with perfectionist critics such as Raz, who also assume that persuasive governmental action will enhance and foster, rather than diminish, autonomy.

Dworkin attempts to ensure that governmental persuasion enhances, rather than hinders, ethical agency and autonomy by proposing factors to consider in distinguishing measures that encourage responsibility from those that coerce. The measures "could reasonably be expected to make a woman's deliberation about abortion more reflective and responsible"; they will not prevent some women who have decided responsibly to have an abortion from acting on that

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<sup>260</sup> DWORKIN, *supra* note 135, at 153.

<sup>261</sup> For a similar criticism, see Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1, 60–61 (1994).

<sup>262</sup> DWORKIN, *supra* note 135, at 115.

<sup>263</sup> *Id.* at 159.

decision; and less restrictive means are not available.<sup>264</sup> If these criteria are satisfied (and Dworkin concludes that they probably were not with respect to the statute at issue in *Casey*<sup>265</sup>), then persuasion in one direction is a form of facilitation.

Second, facilitating women's reproductive autonomy is not government's only legitimate interest, or proper business, in the abortion issue. Abortion, Dworkin claims, lies at the "intersection of two sometimes competing traditions" in America's political heritage, requiring reconciliation: "the tradition of personal freedom" and "government responsibility for guarding the public moral space in which all citizens live."<sup>266</sup> This leads to a model of shared jurisdiction between the individual and government: the right of personal sovereignty to make the "ultimate" decision intersects with governmental authority to protect intrinsic values and the moral environment. Abortion may be morally justified in certain circumstances, but, Dworkin argues, because it involves the termination of life, it always (for both liberals and conservatives) raises a serious moral issue. The moral climate suffers if citizens perceive that other citizens do not take such decisions seriously.<sup>267</sup>

Third, Dworkin seeks to move the abortion controversy beyond pale civility, or empty toleration, to toleration as respect. His gambit is that if citizens came to understand that they differ about a shared value, and if they came to believe that through such legislative measures as governmental persuasion in favor of childbirth women decide reflectively about the requirements of this value, then such a move would be possible. Thus, citizens should care about the decisions that other citizens make implicating the sanctity of life, and may use the tools of government to encourage reflective decisionmaking, but must accept the principle that, in the end, citizens are entitled to decide for themselves.<sup>268</sup>

As a matter of constitutional interpretation, Dworkin may be right that nothing in the Constitution precludes states from pursuing the goal of "responsibility," including doing so by means of persuasion. As we have seen, constitutional jurisprudence (at least outside the context of religious belief) distinguishes governmental persuasion and sidetaking from outright compulsion. Whether Dworkin's inclusion of persuasion within the concept of governmental facilitation of moral agency is an attractive interpretation of

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<sup>264</sup> See *id.* at 172-74.

<sup>265</sup> *Id.* at 173-74.

<sup>266</sup> *Id.* at 150.

<sup>267</sup> *Id.* at 30-67, 167.

<sup>268</sup> See *id.* at 9-11, 166-68.

toleration as respect is another question. Certainly, measured against the model of empty toleration dominant in much abortion jurisprudence, his model has considerable appeal. He calls into question selective funding and insists that governmental persuasion (contrary to the scheme in *Casey*) must actually be in the service of reflective decisionmaking. Moreover, his positing of a governmental responsibility to provide “circumstances” that encourage reflective, individual self-determination could support an argument for governmental provision of material and social preconditions for such responsible reproductive self-determination. For all of these reasons, it is an admirable attempt to model how government might simultaneously pursue a public value, such as respect for life, and respect individual autonomy or agency.

A toleration as respect model can readily endorse Dworkin’s call for governmental responsibility to encourage reflective decisionmaking as consistent with a commitment to a jurisdictional principle of respect for deliberative autonomy. But it would hesitate to embrace the idea that government encourages reflective decisionmaking by persuading against the exercise of a protected choice. To be sure, it is difficult to sort out whether the principle of facilitating autonomy through persuading in favor of one choice is objectionable as a matter of principle or due to its application in the abortion context. Taken in the abstract, the proposition that governmental persuasion could help people live self-governing lives by facilitating “wise exercise” of their rights and reflection on their responsibilities is plausible—especially if it came with a set of requirements reasonably ensuring that it would do so. But we have not yet seen an adequate model of such persuasion in constitutional abortion jurisprudence.

Obviously, one could argue that women who seek abortions do not need persuasion in favor of abortion; to the contrary, to the extent they have not considered the other side, one-sided persuasion in favor of childbirth may enhance their decisionmaking process.<sup>269</sup> But if the goal is reflective decisionmaking, and if abortion may be a morally justifiable and responsible choice, a more balanced presentation of the parameters of responsible reproductive choice could serve that goal and avoid overt governmental sidetaking. And while there is clear public support for “persuasive” informed

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<sup>269</sup> For example, Mill contended that no one’s opinions deserve the name of knowledge “except so far as he has either had forced upon him by others, or gone through of himself, the same mental process which would have been required of him in carrying on an active controversy with opponents.” MILL, *supra* note 8, at 44.

consent schemes,<sup>270</sup> it may be that a balanced counselling scheme could also serve the purpose of yielding greater respect for women's decisions. Yet, for those persons who believe that abortion is always the wrong decision, even a *Casey*-type scheme of persuasion will likely fail to garner respect for women's decisions (much less their legal right to abortion).<sup>271</sup>

Dworkin's argument points to the need for a toleration as respect model to articulate a vision of the human goods and public values that government should promote as part of fostering reflective reproductive self-determination. Although I cannot fully develop the application of toleration as respect to reproduction here, feminist analysis of the preconditions for and the parameters of responsible sexual and procreative choice should inform it. In addition to the value of respect for life, government should advance such public values as, for example, the equal citizenship of women, reproductive health of its citizens, and social reproduction (i.e., the importance of bearing and nurturing children and preparing them for citizenship).<sup>272</sup>

Toleration as respect would not understand reproductive rights as solely negative liberties, imposing no affirmative obligations on government, but would aim at reproductive health as a component of positive liberty, including but not limited to abortion.<sup>273</sup> It would elaborate a notion of governmental responsibility to establish the material and social preconditions for women's equal citizenship, including attention to problems such as sexual violence, other threats to women's bodily integrity, and women's poverty. At present, public

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<sup>270</sup> See Carey Goldberg & Janet Elder, *Public Still Backs Abortion, but Wants Limits, Poll Says*, N.Y. TIMES, Jan. 16, 1998, at A1 (reporting shift in public opinion from general acceptance of abortion to a "permit but discourage model").

<sup>271</sup> An instructive example may be the small but vocal group Feminists for Life of America. They urge other groups opposed to legal abortion to recognize that women's abortion decisions are not easy or for reasons of "convenience," but they nonetheless oppose legal abortion, arguing that the solution is to "eliminate the crisis, not the child." See Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, in FEMINIST NIGHTMARES: WOMEN AT ODDS 159-88 (Susan Ostrov Weisser & Jennifer Fleischer eds., 1994).

<sup>272</sup> For example, Rawls suggests that a balance of such important political values as due respect for life, the equality of women, and orderly social reproduction would yield at least a limited right to abortion. See RAWLS, *supra* note 6, at 243 n.32.

<sup>273</sup> See PETCHESKY, *supra* note 235, at 388-401; see also RUTH COLKER, ABORTION AND DIALOGUE xvi (1992) (advocating moving abortion debate to discussion of "effective and respectful reproductive health strategies"); Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in REPRODUCTIVE LAWS FOR THE 1990S 15-38 (Sherrill Cohen & Nadine Taub eds., 1988) (describing necessary components of a program to meet the reproductive health needs of poor women and women of color).



policy emphatically does not foster women's reproductive well-being. The protection of "potential life" and encouragement of women's "responsibility" does not translate into acceptance of collective responsibility and a strong commitment of resources to foster the equal citizenship of women as mothers and the well-being of families.<sup>274</sup> There is a "wide gap" between "our political rhetoric about 'family values' and our public policies" when it comes to "truly valuing families."<sup>275</sup> For example, government restricts funds, facilities, and even access to medical information to steer indigent pregnant women, many of whom are not married, toward childbirth. Yet far from supporting childbirth and childrearing by single mothers, government diagnoses "illegitimacy" and single-parent families as a social pathology, and seeks to deter any financial "incentives" toward such "irresponsible" reproduction by excluding such families from various governmental benefits.<sup>276</sup>

A toleration as respect model's preferred approach to informed consent would be balanced counseling encouraging responsible self-determination—more akin to Dworkin's idea of encouraging citizens to reflect upon the best application of a contested value to their lives—rather than governmental steering toward one choice over another.<sup>277</sup> To be sure, the task of agreeing upon the relevant public values and deciding upon their proper application to abortion is daunting (and perhaps impossible), given the persistent moral conflict over abortion and what constitutes morally and socially responsible

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<sup>274</sup> See, e.g., West, *supra* note 238, at 964–67 (arguing that *Casey*'s attempt to recognize women's reproductive responsibility lacks model of mutual responsibility, whereby government accepts responsibility to secure women's equal citizenship (invoking Rawls's model of justice)).

<sup>275</sup> DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 213 (1997).

<sup>276</sup> See McClain, *supra* note 237, at 396–408; FINEMAN, *supra* note 237, at 101–25. Women of color suffer disproportionately from this labelling and these public policies. See Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 944–45 (1995); Lucy A. Williams, *Race, Rat Bites, and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1174–85 (1995). Another example of the limits of current public policy is the approach to the complex topics of teen sexuality and teen motherhood. For instructive critiques of such policy, see KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* (1996); *THE POLITICS OF PREGNANCY: ADOLESCENT SEXUALITY AND PUBLIC POLICY* (Annette Lawson & Deborah L. Rhode eds., 1993).

<sup>277</sup> For example, one feminist theorist suggests requiring health care providers to offer voluntary counselling sessions concerning relevant ethical issues for all pregnant women and their partners, whether they plan to continue or terminate their pregnancies. See Ruth L. Colker, *Feminism, Theology, and Abortion*, 77 CAL. L. REV. 1011, 1067 (1989).

reproductive choice.<sup>278</sup> A related challenge would be deciding upon the range of views concerning childbirth and abortion that government should present to encourage reflective decisionmaking. This degree of moral conflict, along with the current contradictions in public policy concerning responsible reproduction, suggest reasons to be cautious about embracing governmental persuasion in the service of women's reproductive autonomy in the absence of a more complete and coherent set of public values and public policies that government should promote. A consideration of the import of the diversity rationale for toleration yields further reason for caution concerning the embrace of governmental persuasion in the service of personal self-government.

## V. THE DIVERSITY RATIONALE

The model of toleration as respect also draws upon a third justification for toleration, the diversity rationale: persons exercising their moral powers will inevitably have different, or diverse, beliefs and ways of life; therefore using government to secure uniformity is inappropriate and unduly oppressive. For example, in his argument for religious toleration, Locke contended: "It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which might have been granted), that has provoked all the bustles and wars that have been in the Christian world upon account of religion."<sup>279</sup> Mill rested his defense of liberty in part on the assumption that human beings were diverse in their nature and needed diverse circumstances within which to develop and flourish. He contended that each person generally knows best what will make her or his life go well, and society usually acts wrongly when it acts to direct that life's course.<sup>280</sup> In contemporary arguments for toleration, the diversity rationale translates from religion,

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<sup>278</sup> See GUTMANN & THOMPSON, *supra* note 121, at 74 (critiquing Rawls's attempt to resolve abortion conflict by appeal to political values and arguing that abortion is paradigm of deliberative disagreement, on which consensus may remain elusive); RAWLS, *supra* note 6, at iv-ivi & n.31 (acknowledging that, despite his argument that a reasonable balance of political values might yield a right to abortion, the disputed abortion question may lead to a "stand-off"); Robert P. George, *Public Reason and Political Conflict*, 106 YALE L.J. 2475, 2485-95 (1997) (disputing Rawls's appeal to political values and arguing for need to appeal to comprehensive doctrines). On the difficulty, if not impossibility, of compromise, see, for example, TRIBE, *supra* note 130; Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921. On conscientious disagreement over the morality of abortion in various circumstances, see DWORKIN, *supra* note 135, at 30-67.

<sup>279</sup> LOCKE, *supra* note 7, at 57. *But see* MENDUS, *supra* note 73, at 37-39 (arguing that Locke's argument did not rest on the value of diversity).

<sup>280</sup> See MILL, *supra* note 8, at 53-69.

narrowly conceived, to the broader concept of toleration of different comprehensive moral doctrines or ways of life. A common assumption in such arguments is that toleration is appropriate because a stable polity can exist notwithstanding such diversity. For example, the diversity rationale features as a justification for constitutional rights, as is evident from *Barnette*'s statement that "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."<sup>281</sup>

The diversity rationale has prudential and normative underpinnings, both of which are important to a model of toleration as respect. For example, one could make a prudential argument for toleration that derives from acceptance of the idea that "diversity of reasonable comprehensive religious, philosophical, and moral doctrines" is a permanent feature of a democratic public culture in which persons freely exercise their moral powers (what Rawls calls the "fact of reasonable pluralism").<sup>282</sup> Because achieving uniformity is not possible without "intolerable" oppressive state power ("the fact of oppression"), toleration is appropriate.<sup>283</sup> Rawls posits that a stable polity is possible without an orthodoxy about the good life, or a unified comprehensive moral doctrine. The normative arguments are two-fold. First, similar to the jurisdictional rationale, the diversity rationale assumes an entitlement to self-government, or a realm of personal sovereignty. Second, as Rawls puts it, the fact of diversity is "not an unfortunate condition of human life,"<sup>284</sup> but is a positive good for society. Similarly, Mill appealed not only to the fact of the diversity of human nature, but also to the value to society of different "experiments of living."<sup>285</sup>

In this Part, I argue that the diversity rationale for toleration offers great promise for moving beyond empty toleration to toleration as respect. It is not necessary to accept the robust form of the argument, that is, that pluralism is a positive good, to accept the diversity argument. At a minimum, it may simply reflect a prudential *modus vivendi*, or a "resigned acceptance of difference for the sake of peace."<sup>286</sup> Indeed, someone might long to use state power to

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<sup>281</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943). A more recent example is *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), in which the joint opinion spoke of "reasonable people" having "different opinions" concerning contraception and abortion and of its responsibility not to impose the "moral code" of the members of the Court upon society, but to uphold the liberty of all.

<sup>282</sup> RAWLS, *supra* note 6, at 36.

<sup>283</sup> *Id.* at 37.

<sup>284</sup> *Id.* at 36, 144.

<sup>285</sup> MILL, *supra* note 8, at 54.

<sup>286</sup> WALZER, *supra* note 26, at 10.

achieve adherence to her view of the good, but refrain because of the risk of instead achieving the gulag (or, as *Barnette* put it, “the unanimity of the graveyard”).<sup>287</sup> But the robust form of the diversity argument allows for the possibility of a continuum of “more substantive acceptances [of difference],” ranging from openness to others, to curiosity and a willingness to learn, to respect, and even to “enthusiastic endorsement of difference.”<sup>288</sup> Toleration, therefore, allows for engagement and transformation. Toleration as respect fosters that engagement through such ideals as mutual respect and civility as a guiding framework for how citizens should engage in the political sphere.

The diversity argument for toleration as respect does not preclude a formative project. Rawls’s strategy of toleration in the face of reasonable moral pluralism draws perfectionist criticism for its supposed inattention to, and even preclusion of, a formative project. I argue that political liberalism’s approach to how government might engage in a formative project is an instructive guide to developing the model of toleration as respect, which would meld feminist and liberal commitments. In particular, I consider feminist criticisms of Rawls’s commitment to toleration as posing an obstacle to women’s equality and suggest that the gap between a political liberal and a feminist approach is narrower than such criticisms assume. Examining debates within feminism over a formative project, I raise a number of concerns about the viability of a perfectionist project engaging in steering among ways of life in a pluralistic society and suggest the comparative strength of an approach more akin to political liberalism.

I also use the current debate over same-sex marriage to illustrate these concerns, and to point to the comparative strength of a toleration as respect model to undergird arguments for same-sex marriage. Here I challenge a

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<sup>287</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. at 641. Thanks to my colleague Mark Movsesian for this observation about the gulag.

<sup>288</sup> WALZER, *supra* note 26, at 10, 11. Although my focus here is on pluralism of comprehensive moral doctrines, or ways of life, the same potential for movement between the fact and value of diversity applies to other types of diversity. A common understanding of the United States is that it is a pluralistic society harboring many forms of diversity, including ethnic, racial, cultural, and religious diversity. The diagnosis of intolerance as a major social problem is a staple of public discourse, as is the call to respect and even appreciate difference and diversity. See, e.g., Jim Carnes, *Us and Them: A History of Intolerance in America* (1995) (publication of Southern Poverty Law Center’s ongoing education project, *Teaching Tolerance*); Rick Allen, *Some Local Faces Join the “Gorgeous Mosaic”*, WASH. POST, Apr. 23, 1992, available in 1992 WL 2191892 (reporting on art project inspired by coining of term “gorgeous mosaic,” by former Governor Mario Cuomo and former New York City Mayor David Dinkins, to describe New York’s cultural diversity). A serious issue that I do not address here is the tension between a commitment to pluralism and the ideal of national unity.

common assumption among some scholars and advocates of gay and lesbian rights that to secure the right of marriage, it is necessary to move beyond liberal toleration rhetoric to perfectionist, substantive moral argument.<sup>289</sup> Instead, I suggest that the diversity rationale for toleration supports the argument that barring same-sex marriage enforces an intolerant gender orthodoxy. Moreover, by raising the possibility of cultural transformation, it offers the promise of moving beyond empty toleration.

### A. *The Diversity Argument in Political Liberalism*

Rawls argues that government should not embrace any comprehensive moral doctrine, whether the liberalism of Mill or Kant, the civic republicanism of Hannah Arendt, or moral conservatism. Similarly, government should not attempt to secure agreement upon an orthodoxy concerning the best way of life or to discover and impose the "whole truth" in politics. He speaks of this as the application of religious toleration to philosophy: it is left to citizens themselves to settle the questions of religion, philosophy, and morality in accord with views that they freely affirm.<sup>290</sup> Instead, in light of the "fact of reasonable pluralism" and "the fact of oppression," we should seek agreement upon a political conception of justice, which is to establish fair terms of social cooperation among citizens on the basis of mutual respect and trust. The basis of social unity should not be a comprehensive moral doctrine that could not be endorsed generally by citizens, but principles of constitutional government that all citizens, whatever their comprehensive views, can reasonably be expected to endorse.<sup>291</sup>

The impetus for toleration is peaceful coexistence in the face of diversity (as contrasted with civil war), but political liberalism aims at more than a grudging *modus vivendi*. It posits that persons, from within their diverse comprehensive moral doctrines, can reach an overlapping consensus, which undergirds and sustains a political conception of justice.<sup>292</sup> It aims to go beyond a *modus vivendi* through honoring such duties as civility and mutual respect.

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<sup>289</sup> See SANDEL, *supra* note 3, at 99–108; Chai Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 243 (1996) (drawing on Sandel); Ball, *supra* note 207, at 1919–43 (drawing on Raz); cf. Andrew M. Jacobs, *The Rhetorical Construction of Rights*, 72 NEB. L. REV. 723, 724 (1993) (calling for gay rights proponents to move discourse from rhetoric of disapprobation, to tolerance, and finally to affirmation), cited in *Romer v. Evans*, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting).

<sup>290</sup> See RAWLS, *supra* note 6, at 10, 154.

<sup>291</sup> See *id.* at xx, 10–15, 99, 206.

<sup>292</sup> See *id.* at xxxix–xl, 146–47.

### 1. *Mutual Respect as a Way Beyond Empty Toleration*

A toleration as respect model may usefully draw on political liberalism's requirements of such duties as civility, mutual respect, and reciprocity. Rawls's framework goes beyond empty toleration in several ways. First, political liberalism aims to secure citizens' capacity for democratic and personal self-government through according to them a set of basic liberties; citizens show mutual respect for each other in publicly affirming such liberties.<sup>293</sup> Second, citizens, pursuant to the duty of civility, engage in reason-giving and attempt to understand each other's perspectives.<sup>294</sup> For example, Amy Gutmann's and Dennis Thompson's model of deliberative democracy, drawing on Rawls, distinguishes mere toleration from mutual respect because, while both are "a form of agreeing to disagree," mutual respect demands more: "It requires a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees."<sup>295</sup> On this model, such constructive engagement may reduce the areas of moral disagreement in politics by reaching accommodation that is acceptable to citizens from within their various perspectives.<sup>296</sup>

Requiring that citizens give reasons for their positions on public policies that can be accepted by others who do not share their comprehensive doctrines is one way of fostering such accommodation and renouncing the quest for comprehensiveness. For example, an appeal to the authority of the Bible as a reason to exclude sexual orientation from antidiscrimination law or to bar same-sex marriage would fail this test.<sup>297</sup> But in a pluralistic society, it is likely that, despite such engagement, there will remain areas of genuine "deliberative disagreement," in which citizens "continue to differ about basic moral principles even though they seek a resolution that is mutually justifiable."<sup>298</sup>

Third, citizens within political liberalism show mutual respect by not using the political process to impose their comprehensive moral views on other citizens. Rather, they abide by an ideal of reciprocity, and desire "for its own

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<sup>293</sup> See RAWLS, *supra* note 6, at 319.

<sup>294</sup> See *id.* at 217.

<sup>295</sup> GUTMANN & THOMPSON, *supra* note 121, at 79.

<sup>296</sup> See *id.* Just as political liberalism supposes that citizens with diverse comprehensive moral doctrines can reach an overlapping consensus on principles of justice to structure the polity, so too there is an appeal to overlapping consensus in deliberating about and agreeing upon specific policies. See RAWLS, *supra* note 6, at 14-15, 144-54, 213-18.

<sup>297</sup> Cf. GUTMANN & THOMPSON, *supra* note 121, at 56-57 (discussing biblical opposition to miscegenation).

<sup>298</sup> *Id.* at 73. Gutmann and Thompson regard abortion as a likely example of such genuine deliberative disagreement. See *supra* text accompanying note 278.

sake a social world in which they, as free and equal, can cooperate with others on terms all can accept.”<sup>299</sup> These aspects of Rawls’s account derive from an assumption that because reasonable moral pluralism is inevitable in a democratic culture in which persons are free to exercise their moral powers, and not to be regretted, political liberalism’s distinction between the political and the comprehensive is appropriate. Gutmann and Thompson state: “In a pluralist society, comprehensive moral conceptions neither can nor would win the assent of reasonable citizens. A deliberative perspective for such societies must reject the unqualified quest for agreement because it must renounce the claim to comprehensiveness.”<sup>300</sup>

Political liberalism’s approach to moral pluralism fails to satisfy perfectionist critics who charge that linedrawing between the comprehensive and the political is neither a feasible nor an attractive response to pluralism. For example, Sandel launches two criticisms going in different directions. First, if there is “reasonable moral pluralism” concerning comprehensive moral doctrines, there may also be diversity concerning conceptions of justice, which would make securing agreement in politics more difficult than Rawls posits. Second, if political liberalism assumes that citizens, despite diverse comprehensive moral views, can reach agreement that certain principles of justice are more reasonable than others, then why not assume that citizens can and should similarly reason that certain comprehensive moral doctrines are more reasonable than others, so that government need not be neutral among them?<sup>301</sup>

There is no simple answer to Sandel’s first criticism, other than to say that history offers evidence that it is in fact easier to secure agreement upon a political framework of basic liberties than upon a shared conception of the good.<sup>302</sup> As to the second criticism, Sandel’s own republicanism suggests the difficulty of reaching such agreement on conceptions of the good, making his republican project vulnerable to the criticism that it is unattainable. To a surprising degree, Sandel’s pluralistic republicanism parallels political liberalism in recognizing diversity and moral pluralism as inevitable features of contemporary American society and in renouncing the quest for a unitary common good.<sup>303</sup> Although he claims that his republicanism will better satisfy

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<sup>299</sup> RAWLS, *supra* note 6, at 50.

<sup>300</sup> GUTMANN & THOMPSON, *supra* note 121, at 92.

<sup>301</sup> See Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1783–86 (1994) (reviewing RAWLS, *supra* note 6).

<sup>302</sup> See RAWLS, *supra* note 6, at 133–72.

<sup>303</sup> See SANDEL, *supra* note 3, at 318–21.

citizens' longings for moral argument in the political arena than political liberalism, he concedes that it offers no guarantees of agreement or even of appreciation for the moral and religious convictions of others.<sup>304</sup>

## 2. Does Political Liberalism's Commitment to Toleration Rule out a "Formative Project" of Promoting Self-Government?

A reasonable inference from political liberalism's rejection of the quest for a unitary comprehensive moral view is that governmental moralizing in the service of a particular way of life is inappropriate and oppressive.<sup>305</sup> Indeed, the very notion of governmental moralizing concerning the good may sound odd within a Rawlsian framework. But does the renunciation of a government-fostered comprehensive moral doctrine mean that government may not play any role in shaping citizens and promoting values? Sandel certainly thinks so, and criticizes Rawls's "minimalist" liberalism as barring a formative project.<sup>306</sup> Similarly, perfectionist liberal critics such as Raz depart from Rawls because of his supposed requirement of "neutrality" and narrow conception of government's role in shaping citizens and promoting values.<sup>307</sup> They charge that government should promote the well-being of its citizens; government must represent and promote some values (such as autonomy).<sup>308</sup>

Feminist critics fault political liberalism for its supposed inattention to the preconditions for women's self-government as well as the supposed limits that it places upon using government to advance feminist goals. In particular, a number of feminists endorse Susan Moller Okin's well-known critique of Rawls's theory of justice for its inattention to the problem of injustice within the family.<sup>309</sup> Okin charges that the unjust division of labor within the family—whereby women bear primary responsibility for household labor and childcare—impairs women's capacities as citizens and their abilities to pursue

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<sup>304</sup> See Sandel, *supra* note 301, at 1794.

<sup>305</sup> For example, although Rawls generally does not speak in terms of "neutrality" (which he considers an "unfortunate, misleading term"), his account of liberalism does embrace what he calls neutrality of aim: that society should not design basic institutions to favor any particular comprehensive doctrine. See RAWLS, *supra* note 6, at 191–94.

<sup>306</sup> See SANDEL, *supra* note 3, at 4–7.

<sup>307</sup> See GALSTON, *supra* note 36, at 140–62; RAZ, *supra* note 13, at 124–33.

<sup>308</sup> See, e.g., Gardbaum, *supra* note 36, at 404–16 (arguing against political liberalism and for comprehensive liberalism).

<sup>309</sup> See OKIN, *supra* note 54; Okin, *supra* note 54. For examples of Okin's influence, see Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860 (1994); Yuracko, *supra* note 46.



their conceptions of the good (exacerbated by, e.g., employment discrimination encouraging women to invest in childrearing rather than market labor) and may thwart the development in children of a sense of justice and of the capacities necessary for the exercise of their moral powers.<sup>310</sup> Rawls's theory, Okin further claims, puts liberal toleration squarely in conflict with sex equality, for it requires toleration of comprehensive moral doctrines (such as those of some religious fundamentalists) that espouse or require such a sexist division of labor between women and men.<sup>311</sup>

Is Rawls's political liberalism vulnerable to these various criticisms? The gap between Rawls and his critics as to government's authority to pursue a formative project fostering citizens' capacities for self-government is not as great as it might appear. A model of toleration as respect would usefully build upon the common ground between political liberalism and its perfectionist critics.

First, Rawls's political liberalism recognizes a proper role for government in helping to develop the moral powers, or moral capacities of citizens, to prepare them for self-governing citizenship. Rawls posits two moral powers pertaining to self-government in the senses of deliberative democracy and deliberative autonomy: the capacity for a conception of justice and the capacity for a conception of the good.<sup>312</sup> According persons a set of basic rights, liberties, and opportunities, and means such as income and wealth helps them to develop and exercise these moral powers, by providing them with the "primary goods" that citizens need to be free and equal.<sup>313</sup> Political liberalism's conception of a "good" political society is one in which citizens can develop and exercise such moral powers and have the social bases of "mutual self-respect."<sup>314</sup> Thus, government has a responsibility to facilitate the ability of citizens to live good lives, however they may define such lives.

A primary mechanism that political liberalism supports—as do a wide range of liberals, civic republicans, and deliberative democrats—is compulsory

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<sup>310</sup> See *id.* at 35–39; OKIN, *supra* note 54, at 97–101. For a thoughtful evaluation of this feminist criticism, see S.A. Lloyd, *Situating a Feminist Criticism of John Rawls's Political Liberalism*, 28 LOYOLA L.A. L. REV. 1319 (1995). Rawls's response to Okin's criticism is addressed in text *infra* accompanying notes 330–36.

<sup>311</sup> See Okin, *supra* note 54, at 28.

<sup>312</sup> See RAWLS, *supra* note 6, at 19. See *supra* note 6 and accompanying text for my usage of the terms "deliberative democracy" and "deliberative autonomy."

<sup>313</sup> See *id.* at 178–81, 325, 331–34.

<sup>314</sup> *Id.* at 202–03. Feminist legal scholar Drucilla Cornell enlists Rawls's emphasis upon the primary good of self-respect in her proposed redefinition of sexual harassment law. See DRUCILLA CORNELL, *THE IMAGINARY DOMAIN* 168–227 (1995).

education of children to prepare them for citizenship. To honor the requirements of toleration, Rawls seeks to avoid inculcating children in a comprehensive, rather than a political, liberal conception; for example, to respect the rights of persons whose religions reject the modern world and such values as individuality and autonomy. Nonetheless, Rawls states that education should prepare children to be "fully cooperating members of society," able to understand and participate in the public culture, and should "encourage the political virtues" (such as social cooperation).<sup>315</sup> It should educate them as to their constitutional and civic rights so that, for example, "they know that liberty of conscience exists in their society and that apostasy is not a legal crime."<sup>316</sup>

Of course, the goal of a democratic education that simultaneously prepares children to live in a diverse, morally pluralistic society, in which toleration is a virtue, and attempts to respect the rights of parents to instruct their children in a particular way of life that rejects such "modern" values as toleration is difficult (and perhaps unattainable).<sup>317</sup> That education concerning liberal virtues and rights to freedom of conscience may have a withering effect on illiberal doctrines is undeniable.<sup>318</sup> Rawls's strategy may be too modest for those who argue that preparation for self-government must include developing the capacity for critical reflection about ways of life, including one's own.<sup>319</sup> At the same time, this strategy is too overreaching for those who contend that education in such liberal virtues as diversity, tolerance, and freedom to choose one's way of life enforces "secular humanism" and has a corrosive effect on the world views of persons with fundamentalist religious convictions, who reject such liberal values as critical reflection upon ways of life.<sup>320</sup> Resolving this controversy is not my aim: the point is that political liberalism recognizes governmental responsibility to develop citizens' moral capacities.

With respect to adults, political liberalism attempts to foster citizens' capacities for self-government through meeting citizens' needs and securing

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<sup>315</sup> RAWLS, *supra* note 6, at 199.

<sup>316</sup> *Id.*

<sup>317</sup> For an argument that teaching tolerance is intolerant because it threatens the fundamentalists' way of life, see Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993).

<sup>318</sup> See RAWLS, *supra* note 6, at 199-200; MACEDO, *supra* note 48, at 253, 268-69.

<sup>319</sup> See AMY GUTMANN, DEMOCRATIC EDUCATION (1987); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995).

<sup>320</sup> See GALSTON, *supra* note 36, at 251-55; Stolzenberg, *supra* note 317. For a defense of liberal education against this sort of criticism, see STEPHEN MACEDO, DIVERSITY AND DISTRUST (forthcoming 1998).

basic liberties pertaining to democratic and personal self-government. To make these liberties meaningful, government should undertake an array of facilitative measures, such as supporting education and the arts, insuring fair or equal opportunity, engaging in economic redistribution, and fostering political participation.<sup>321</sup> Thus, while the goal is not comprehensive liberal autonomy, but political autonomy, there is much government can and should do under the rubric of fostering citizenship and the development and exercise of the two moral powers. Indeed, it is arguable that what truly separates perfectionism that stresses self-government and political liberalism is how the argument for such governmental responsibility is made: perfectionists appeal to furthering human goods, while political liberals appeal to fostering citizenship.<sup>322</sup>

Second, while it would be odd to use the term “governmental moralizing” concerning the good from within a political liberal framework, political liberalism would support governmental persuasion in the form of promoting political (or public) values such as the equal citizenship of women and discouraging beliefs or conduct that undermine such values. Contrary to Sandel’s stark dichotomy between liberalism and republicanism, Rawls claims that political liberalism and classical republicanism are compatible with respect to the idea that citizens must have political virtues and be willing to take part in public life.<sup>323</sup> Rawls allows that society may affirm the superiority of certain forms of moral character and affirm moral virtues linked to justice as fairness, for example, the virtues of tolerance, civility, reciprocity, and cooperation.<sup>324</sup> The key distinction with respect to appropriate and inappropriate governmental persuasion is between promoting virtues (or values) characterizing the ideal of the good citizen and promoting virtues characterizing ways of life belonging to particular comprehensive moral doctrines.<sup>325</sup> Put another way, subject to this limit, political liberalism would allow government engaging in “norm management,” or seeking to shape social meanings, to encourage compliance with law, acceptance of the principles of justice and political virtues, and

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<sup>321</sup> Frank Michelman’s Rawlsian arguments for constitutional welfare rights are one example. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

<sup>322</sup> See Will Kymlicka, *Liberal Egalitarianism and Civic Republicanism: Friends or Enemies?*, in *DEBATING DEMOCRACY’S DISCONTENT* (Anita L. Allen & Milton C. Regan, Jr. eds., forthcoming 1998).

<sup>323</sup> See RAWLS, *supra* note 6, at 205.

<sup>324</sup> See *id.* at 194.

<sup>325</sup> See *id.* at 194–95.

development of citizens' capacities for self-government.<sup>326</sup>

Although political liberalism is not coextensive with feminist perfectionism, a considerable number of feminist goals can be pursued within a political liberal framework through the appeal to the political value of equal citizenship. For a model of toleration as respect, the crucial point is that it is possible to seek to secure the equal citizenship of women and foster women's self-government without explicitly embracing perfectionism. Within a political liberal framework, government need not be "neutral" as between the equality of women and the subordination of women. Liberal toleration does not extend to "unreasonable" comprehensive moral doctrines, for example, those that seek to use government to deny or violate the basic rights and liberties of women or other groups of citizens.<sup>327</sup> Government may use coercion to secure women's equal citizenship and basic liberties. Thus, antidiscrimination laws such as Title VII appropriately reach "private" power by limiting freedom of employers and employees to discriminate for the sake of securing the equality of citizens, just as the Violence Against Women Act properly protects women against "private" violence.<sup>328</sup> Government could engage in "norm management" to enlist public support for the political value of the equal citizenship of women, such as campaigns against domestic violence or employment discrimination. Further, invoking Rawls's statement that "[t]he same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women," Okin suggests that political liberalism could—and should—embrace an anticaste or antisubordination principle to advance the substantive equality of women.<sup>329</sup>

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<sup>326</sup> See Sunstein, *supra* note 5, at 907–10. Beyond such easy examples as antilittering or recycling campaigns, *see id.* at 904–07, government could discourage religious and racial discrimination to foster toleration (in a manner consistent with protections of freedom of conscience and speech), just as it could campaign against drug addiction and alcoholism because of their destructive effects on the capacity for citizenship. *See* RAWLS, *supra* note 6, at 195 (referring to racial and religious toleration). Thanks to John Rawls for suggesting the drug example in conversation.

<sup>327</sup> *See* RAWLS, *supra* note 6, at 151, 187, 193.

<sup>328</sup> *See* The Violence Against Women Act of 1994, 42 U.S.C. §§ 13931–14040 (1994). Thus, it would be possible to argue for restrictions on pornography if they were necessary to secure the equal basic liberties of women. The vision of governmental "neutrality" that Judge Easterbrook articulates in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), whereby government must treat the equality of women as just another point of view, is not required by political liberalism. Similarly, a Rawlsian approach to hate speech might differ from the Court's approach in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>329</sup> Okin, *supra* note 54, at 25, 39–43 (quoting and discussing RAWLS, *supra* note 6, at

A third and related point is that the principle that government should not prefer and promote one comprehensive moral doctrine over others does not mean that government may not regulate the basic institutions of society in which "personal" or "private" life is lived. Although political liberalism does not require that the principles of political justice directly regulate the internal life of families, they do impose constraints upon the family. Responding to Okin in a recent writing, Rawls grants that his account of liberalism in *A Theory of Justice* paid insufficient attention to the question of justice within the family, but clarifies that "[I]f the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing" within political liberalism: "The equal rights of women and the basic rights of their children as future citizens are inalienable and protect them wherever they are."<sup>330</sup> The argument for toleration of reasonable moral pluralism does not embrace a principle that redressing private violence and subordination are not the proper business of government.

Moreover, Rawls appears to grant Okin's criticism that injustice within the family could impair not only women's equal citizenship but the capacity of children to develop their moral powers and to be fully cooperating members of society. He invokes Mill's condemnation of the family as a "school for male despotism," which inculcated antidemocratic habits of thought, feeling, and conduct.<sup>331</sup> So too, today, Rawls argues, if injustices within the family "undermine children's capacity to acquire the political virtues required of future citizens in a viable democratic society," then "the principles of justice enjoining a reasonable constitutional democratic society can plainly be invoked to reform the family."<sup>332</sup> In particular, Rawls targets the "long and historic injustice" that women have borne and continue to bear in shouldering "an unjust share of the task of raising, nurturing and caring for their children," and notes that, when divorce laws further disadvantage women, bearing this burden makes them "highly vulnerable."<sup>333</sup>

Political liberalism's commitment to toleration and such basic liberties as freedom of conscience requires that government cannot mandate the equal division of labor in the family or forbid a gendered division of labor. Instead, political liberalism would aim at a "social condition" in which the "involuntary

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<sup>330</sup> John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 791 (1997).

<sup>331</sup> *Id.* at 790 (discussing MILL, *supra* note 8, at 283-98).

<sup>332</sup> *Id.* at 790-91.

<sup>333</sup> *Id.* at 790.

division of labor" in the family must be "reduced to zero," but would permit any remaining "voluntary" division of labor (e.g., employment discrimination in the workplace, which may contribute to women's "preferences" in the household division of labor by making a gendered division seem the "rational" and less costly thing to do, should be forbidden).<sup>334</sup> Such political values as the equality of women and basic rights of children require that government protect women and children against private violence and abuse in the home. Arguably, adequate child care, flex time, and family leave should be required.<sup>335</sup> And, if a "basic . . . cause of women's inequality is their greater share in the bearing, nurturing, and caring for children in the traditional division of labor within the family, steps need to be taken either to equalize their share, or to compensate them for it" (e.g., upon divorce, giving wives an equal share in a husband's income earned during marriage).<sup>336</sup> And although government may not mandate the equal division of labor in the household, presumably public schools could use educational materials showing girls and boys in roles challenging the traditional gendered division of labor in the family, to the extent that such modelling could serve to "eliminate differences in their basic liberties and opportunities."<sup>337</sup>

However, with the adoption of these and other necessary measures (which resemble feminist proposals), political liberalism would permit "voluntary" divisions of labor, for example, adopted by people on the basis of their comprehensive moral doctrines in a society in which workplace discrimination against women and other forms of disadvantage do not steer women toward such division. Would a gap remain between Rawls's attempt to secure women's equal citizenship and a feminist program to secure justice within the family? Okin, who advocates an ideal of a genderless family, undoubtedly would embrace the goal of reducing the involuntary division of labor, but might contend that Rawls's commitment to toleration of "voluntary" divisions conflicts with women's equality, because of the threat that certain comprehensive moral doctrines pose to women's self-conception and to children's development.<sup>338</sup>

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<sup>334</sup> *Id.* at 791-92.

<sup>335</sup> See Lloyd, *supra* note 310, at 1331-32.

<sup>336</sup> Rawls, *supra* note 330, at 792-93. Many feminists would also support measures designed to treat housework done by wives as wage work or taxable income, on the theory that such measures would recognize its value.

<sup>337</sup> GUTMANN & THOMPSON, *supra* note 121, at 63-67 (defending, against a fundamentalist Christian challenge, a reading exercise picturing a boy cooking while a girl reads to him).

<sup>338</sup> See Okin, *supra* note 54, at 29-39; see also Lloyd, *supra* note 310, at 1322-38

If Okin is correct, this would pose a serious problem for Rawls's stance of toleration and would provide support for adopting a more "comprehensive" feminist standard for justice within the family.<sup>339</sup> But, as Okin acknowledges, resolving this feminist challenge to toleration depends in part upon evaluating difficult empirical questions.<sup>340</sup> For example, does exposure to gender injustice within the family cause women to adapt their preferences, so that they internalize and accept such injustice as the normal or natural course of affairs, thus raising the question of the "voluntariness" of their acceptance? Or does it (as both the history of feminism and women's personal histories often suggest) provoke a keen awareness of the need for gender justice?<sup>341</sup> An important variable is the formative role of other institutions of civil society and the public culture: the impact of family hierarchy may be quite different in a society that reinforces such hierarchy than in a (political liberal/feminist) society that is committed to the basic rights, liberties, and equal opportunities of women and men.<sup>342</sup>

At the same time, political liberalism's commitment to toleration of diverse family forms that reflect reasonable moral pluralism, and its eschewal of government mandating particular family forms or internal structures, may make it appealing to feminists, gay rights advocates, and others who seek more inclusive definitions of family. Political liberalism takes a functional approach to the family and to the rights of gay men and lesbians to be parents: "[N]o particular form of the family (monogamous, heterosexual, or otherwise) is required by a political conception of justice so long as the family is arranged to fulfill [its] tasks effectively and doesn't run afoul of other political values."<sup>343</sup>

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(elaborating Okin's criticism).

<sup>339</sup> See Lloyd, *supra* note 310, at 1332–38.

<sup>340</sup> See Okin, *supra* note 54, at 38 n.32.

<sup>341</sup> See *id.*; Lloyd, *supra* note 310, at 1336–38.

<sup>342</sup> Okin gives the example of women in Druze Arab families in Israel, who could not resist the power of the male family head over their activities and decisions, which they regarded as unfair, "because of the sanctions—including being thrown out of the house, beaten, or divorced—that disobedience was likely to invoke." Okin, *supra* note 54, at 36–37. But a political liberal society would prohibit such "sanctions" as violence and divorce laws that unjustly disadvantage women.

<sup>343</sup> Rawls, *supra* note 330, at 788 n.60. Within political liberalism, the family is part of the basic structure of society, because "one of its main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next." *Id.* at 788. But here I would caution that, in the case of single parent families, in which poverty is a major variable affecting the well-being of children, a functional approach that uncritically accepted the existing status quo of economic distribution might fail to consider appropriate questions of collective responsibility. See FINEMAN, *supra* note 237, at 101–25, 226–36;

Rawls continues: “[A] central role of the family is to arrange in a reasonable and effective way the raising of and caring for children, ensuring their moral development and education into the wider culture” through, for example, providing children with a sense of justice and the political virtues that support political and social institutions.<sup>344</sup>

Political liberalism’s approach, indeed, is similar to that taken in the recent Hawaii case of *Baehr v. Miike*.<sup>345</sup> The court held that because the state failed to demonstrate that its compelling interest in the optimal development of children required that families consist of married, biological (or at least heterosexual) parents, excluding gay men and lesbians from marriage was unconstitutional.<sup>346</sup> Gay and lesbian parents, the state’s own experts testified, can be “as fit and loving parents, as non-gay men and women and different-sex couples.”<sup>347</sup> Thus, in contrast to prior state court opinions finding that, because raising children is a primary purpose of marriage, gay men and lesbians were incapable of entering into it, the Hawaii court found a significant resemblance between same-sex families and heterosexual families.<sup>348</sup> The *Baehr* court’s analysis resembles a toleration as respect model in its approach to justification and reason-giving: evaluation of the state’s asserted interest in the optimal development of children took place, not through a no-holds-barred airing of competing comprehensive moral doctrines, biases, and prejudices of citizens concerning gay and lesbian parents, but through a focused inquiry into the actual competencies of such parents. To the extent the court overtly embraced moral values, they were of pluralism and diversity: the common, or political, value is that of a nurturant relationship between parent and child, but there is a “diversity in the structure and configuration of families” that provides this relationship.<sup>349</sup>

In sum, the distinction between the political and the comprehensive in Rawls’s political liberalism does not bar government from undertaking a formative project of helping members of society attain the preconditions for self-government, nor does it tie government’s hands from addressing “private” sources of injustice threatening such self-government. A toleration as respect model could usefully build on Rawls’s framework and upon the considerable

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McClain, *supra* note 237, at 408–19.

<sup>344</sup> *Id.* at 788.

<sup>345</sup> No. CIV. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

<sup>346</sup> *See id.* at \*18, \*22.

<sup>347</sup> *Id.* at \*17.

<sup>348</sup> *See supra* note 211 and accompanying text.

<sup>349</sup> *Baehr*, 1996 WL 694235 at \*17.



common ground among civic republicans, feminists, and political and perfectionist liberals to argue for the responsibility of government to help persons develop their moral capacities for self-government and, to that extent, live good lives. Moreover, Rawls's relative silence on just what government may and should do to further these ends does not preclude a toleration as respect model from elaborating a fuller account of such governmental duty by melding feminist principles with a political liberal framework (as Okin's invocation of an anticaste principle and her own liberal feminist work suggests).<sup>350</sup>

Political liberalism's renunciation of a comprehensive moral doctrine as the basis for social cooperation may be too modest for perfectionists who have a more ambitious conception of government's responsibility to secure agency and autonomy. But political liberalism's very modesty reflects a strategy, adopted in response to the challenge of moral pluralism, for establishing a stable polity that includes groups and individuals who differ deeply on what it means to live a good life. Similarly, the ideals of reciprocity and mutual respect aim to secure more than empty or grudging toleration in a morally pluralistic society. If perfectionists believe that it is better to battle and win in the political arena for their "whole truth" (notwithstanding the competing moral perspectives of the losers in the battle) as a blueprint for what it means to live a good life, then political liberalism's agenda is insufficiently ambitious for them. But do perfectionists offer a viable alternative that takes seriously respect for persons' moral powers and for reasonable moral pluralism? Is perfectionism compatible with the impulse to move beyond empty toleration to respect?

## B. *The Implications of the Diversity Rationale for Government's Formative Project*

### 1. *Perfectionism in the Face of Moral Pluralism*

Civic republican, feminist, and liberal perfectionists all accept, to some degree, the fact as well as the value of diversity. But in contrast to Rawls's eschewal of government promoting the virtues of one comprehensive moral doctrine over another, they support government fostering good lives through

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<sup>350</sup> See, e.g., OKIN, *supra* note 54, at 101–09 (advocating feminist potential of Rawls's difference principle); Susan Moller Okin, *Gender Inequality and Cultural Differences*, 22 POL. THEORY 5 (1994) (doing same in context of international development and women's status); see also CORNELL, *supra* note 314, at 8–20, 167–237 (enlisting and reworking Rawls's concepts of public reason, reasonableness, and the good of self-respect to argue for redefining sexual harassment).

favoring certain ways of life over others. For example, perfectionist liberals argue that the liberal commitment to human autonomy (or agency) and diversity requires that government refrain from compulsion to do so, not that it refrain from making moral distinctions and educating and persuading in the direction of superior ways of life.<sup>351</sup>

But perfectionists generally do not offer an account of the institutional arrangements needed to carry out government's perfectionist project.<sup>352</sup> Nor do they offer much guidance on how to resolve a number of difficult questions concerning the pursuit of a formative project in a diverse polity, which include such concerns as whose perfectionism is to inform government's project and how to resolve conflicts over the content of a good life. Here I use the debate over same-sex marriage and debates within feminist theory to highlight some of those questions. I conclude that a model of toleration as respect should not embrace such a perfectionist project without a resolution of such questions and a clearer picture of its practical institutional application. I also suggest how a toleration as respect model, shaped by the diversity rationale, might offer comparative strengths over a more explicitly perfectionist model.

#### a. *Whose Perfectionism?: The Example of Same-Sex Marriage*

Let us take as a point of departure the perfectionist proposition that the recognition of pluralism and a concomitant commitment to toleration should not preclude government from helping citizens live good, self-governing lives by steering them toward better and away from worse choices. Raz, for example, posits a governmental obligation to provide citizens with an adequate range of options so that they can make morally worthy choices.<sup>353</sup> But whose perfectionism should supply the content of what it means to live a good life and what range of options would facilitate that goal?

Compare the following calls for a perfectionistic politics, both inspired by Raz:

We should strive for a perfectionist moral pluralism that does not prescribe one

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<sup>351</sup> See GALSTON, *supra* note 36, at 222; RAZ, *supra* note 13, at 400–29.

<sup>352</sup> See, e.g., RAZ, *supra* note 13, at 427–29 (stating that *The Morality of Freedom* does not concern the appropriate institutional framework for his pluralistic perfectionism); SANDEL, *supra* note 3, at 317–51 (concluding with some speculations about how to revitalize the civic strand of freedom); Higgins, *supra* note 47, at 1700–03 (calling for, but not elaborating, feminist model of politics entailing governmental responsibility for shaping norms and for applying standard of gender justice).

<sup>353</sup> See RAZ, *supra* note 13, at 205–06.

set of values and activities as necessary for the good life, but recognizes that certain conceptions of the good are demeaning and harmful and should be socially discouraged or curtailed.<sup>354</sup>

[A] sound perfectionism recognizes both that human flourishing is advanced by having a broad array of morally valuable choices and that a diversity of evil choices contributes nothing of practical value to human beings.<sup>355</sup>

The first call comes from a radical feminist perfectionist, and the second from a conservative natural law perfectionist. But is government to embrace a feminist perfectionism, calling for such goods as self-love (i.e., for women valuing themselves as much as they value others) and having an "autonomous conception" of one's own life and goals "not formed under threat or coercion"?<sup>356</sup> Or is it to further a natural law vision of pluralistic perfectionism, which affirms persons' right to make "morally upright" choices reflecting the exercise of "practical reasonableness" and the goods of "authenticity" and "integrity"?<sup>357</sup>

If there could be agreement upon such goods as "autonomy," "authenticity," and "integrity," who is to define their content and what range of options best secures them? The example of same-sex marriage is instructive. First, "integrity" is often mentioned in feminist work as a goal, but few feminists (I assume) would concur in its deployment by some prominent natural law scholars to condemn same-sex intimate association (and all other sexual acts lacking procreative intent) as immoral because they damage personal integrity.<sup>358</sup>

Second, should government afford gay men and lesbians the right to marry because doing so provides them options for exercising their autonomy to make morally worthy choices, and thus to live good lives? Or should it discourage or even "curtail" such marriages because they fail to secure morally valuable

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<sup>354</sup> Yuracko, *supra* note 46, at 48.

<sup>355</sup> GEORGE, *supra* note 70, at 191.

<sup>356</sup> Yuracko, *supra* note 46, at 47.

<sup>357</sup> GEORGE, *supra* note 70, at 176–77.

<sup>358</sup> See Finnis, *supra* note 199, at 1063–70; George, *supra* note 278, at 2497–98. For a sound critique, see Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995). "Authenticity" is also a goal in some feminist writing, but again, feminist conceptions are likely to differ from more conservative ones. See, e.g., Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

goods and reflect “demeaning and harmful” conceptions of the good? Using the example of marriage, Raz observes that individuals depend upon cultural reinforcement in order to make valuable choices. He notes that if monogamy is the only morally valuable form of marriage, then it requires cultural reinforcement, support, and recognition.<sup>359</sup> Further, societies that do not permit same-sex marriage and thus do not recognize it as a collective good deny gay men and lesbians the option of participating in and benefitting from the existing social framework.<sup>360</sup> The pluralistic perfectionism advocated by natural law scholar Robert George draws from Raz a societal duty to support and recognize the institution of monogamous marriage.<sup>361</sup> Government has an obligation to make marriage available to people “capable of fulfilling its requirements,” but he contends that gay men and lesbians lack the capacity to realize the values or goods of marriage (procreative sex and friendship), and therefore that government does not treat them unequally when it denies them this option.<sup>362</sup> In contrast, gay rights scholar Carlos Ball enlists Raz to argue for government’s obligation to foster the autonomy of gay men and lesbians by extending the option of marriage to them and allowing them to realize the substantive moral goods of marriage.<sup>363</sup>

How, and with what criteria, is a perfectionist government to resolve this conflict over the proper range of options to afford citizens? After all, arguments that government should discourage or prohibit repugnant, immoral, and offensive social practices served to justify antimiscegenation laws, segregation, bans on birth control and abortion, and the punishment of fornication and sodomy, and continue to buttress opposition to same-sex marriage.<sup>364</sup> Raz offers little guidance as to what criteria to use in assessing such arguments and notes that government faces many practical problems in properly distinguishing among ways of life based on their worth.<sup>365</sup> If one accepts, as Raz does, the idea of moral pluralism and that there are incommensurable human goods, the

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<sup>359</sup> See RAZ, *supra* note 13, at 162.

<sup>360</sup> See *id.* at 205–06.

<sup>361</sup> See GEORGE, *supra* note 70, at 163–66.

<sup>362</sup> George, *supra* note 278, at 2501.

<sup>363</sup> Ball, *supra* note 207, at 1883–95; see also Feldblum, *supra* note 289, at 331–35 (arguing for the morality of gay love).

<sup>364</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (striking down miscegenation law premised on ideology of white supremacy and appeals to divine proscription on mixing races). On moral objections to same-sex marriage, see Finnis, *supra* note 199.

<sup>365</sup> See RAZ, *supra* note 13, at 412, 427–28.

task seems formidable.<sup>366</sup>

For similar reasons, Sandel's call to justify rights based upon the moral worth of the social practices that they protect, rather than the value of choice itself, seems likely to lead to unresolvable moral conflict rather than a more secure foundation for, say, same-sex marriage. Sandel may overestimate the power of analogy about moral goods to move citizens from grudging toleration to respect and appreciation, especially without any clear criteria for what counts as a moral argument and how judges, legislators, and citizens should evaluate such arguments. How are we to evaluate arguments that same-sex marriage and families allow the realization of substantive moral goods as against arguments that such unions and families are immoral, harmful to the participants, and threaten the institution of marriage? Sandel seeks to open the "naked public square" to persons' substantive moral and religious convictions, but he gives little guidance about how to guard against the triumph of "intolerant moralisms."<sup>367</sup>

#### b. *The Parameters of a Toleration as Respect Argument for Same-Sex Marriage*

In contrast, toleration as respect insists upon the equal basic liberties of citizens and imposes on the deliberative process the requirements of reason-giving and such duties as mutual respect and civility. As discussed above, the recent Hawaii case of *Baehr v. Miike* offers one helpful example of the requirement of reason-giving. The court carefully evaluated the state's assertions concerning the capacities of same-sex parents and rejected its unsubstantiated claims that same-sex marriage adversely affected or prejudiced the institution of marriage and society, stating that "a mere feeling of distaste or even revulsion" due to offense to majority values "cannot justify inherently discriminatory legislation" against a protected class.<sup>368</sup> By embracing political

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<sup>366</sup> See *id.* at 395–99, 401–07. Indeed, he predicts that the practical inability of government to discharge its duty to foster autonomy will lead to a "much more extensive freedom from governmental action" (or negative liberty) than his doctrine of autonomy-based freedom requires, with a result that persons will lack freedom in the robust sense that he advocates. *Id.* at 428.

<sup>367</sup> See Sandel, *supra* note 301, at 1794.

<sup>368</sup> *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996) (quoting *Dean v. District of Columbia*, 635 A.2d 307, 355–56 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part)). Here, the basis for such protection was sex, i.e., the sex of the persons seeking to marry. The State of Hawaii articulated such interests as preserving the traditional definition of marriage and the threat posed by same-sex marriage.

liberalism's bar on citizens' attempting to enforce their comprehensive moral doctrines in politics and to appeal to positions that cannot reasonably be accepted by others who do not share those doctrines, toleration as respect would reject as unreasonable the appeal to Biblical condemnations, just as it would reject arguments against same-sex marriage based upon sectarian ideologies confining the goods of marriage to procreative sexuality.<sup>369</sup>

Moreover, toleration as respect guards against state enforcement of orthodoxy, and prohibiting such marriages rests upon an unjust orthodoxy about gender roles and sexuality. An argument arising from toleration and the diversity rationale could fortify feminist and gay rights scholarship condemning the ban on same-sex marriage as a form of sex discrimination.<sup>370</sup> Such scholars argue that defining marriage as between a man and a woman reflects a gender ideology about proper male and female roles. The history of marriage reveals an institution premised upon a hierarchical relationship of male authority, prerogatives, and powers over the person and property of the female, whose very role as wife carried duties of obedience and service. Gay and lesbian relationships threaten this gender ideology because they "deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity."<sup>371</sup> They also deviate from a gender role ideology that male desire should be directed only at females, and vice versa, similarly threatening the naturalness and inevitability of heterosexuality. Such theorists find (as did the Hawaii court) a powerful analogy in *Loving v. Virginia*, in which the Court struck down Virginia's antimiscegenation law because it lacked any basis other than furthering a governmental orthodoxy of white

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but the court concluded that the state presented "meager" evidence on this and on any adverse effects of same-sex marriage on the institution of traditional marriage. *Id.* at \*17.

<sup>369</sup> I refer to the natural law arguments made by John Finnis and Robert George, discussed *supra* in text accompanying notes 358 & 362. For a critique of such arguments as sectarian and failing to meet the criteria of public reasonableness, see RICHARDS, *supra* note 9, at 444-47; Macedo, *supra* note 358, at 278-98. *But see* George, *supra* note 278, at 2495-2501 (arguing that natural law view of the goods of marriage does appeal to reasons that other citizens can affirm). The Court's contraception cases contradict such a narrow understanding of marital sexuality. *See Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) (arguing that the Court's prior contraception precedents support the right of consenting adults to engage in "nonreproductive, sexual conduct that others may consider offensive or immoral").

<sup>370</sup> For such sex discrimination arguments, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

<sup>371</sup> Law, *supra* note 370, at 218.

supremacy.<sup>372</sup>

Building on these analyses, a toleration as respect model adds the argument that the prohibition of same-sex marriage imposes an intolerant, unjust, and sectarian governmental orthodoxy about gender. In recent work, liberal constitutional scholar David Richards offers an illuminating example of such an argument. He labels political homophobia a "constitutionally illegitimate expression of religious intolerance" that is suspect under the First and Fourteenth Amendments and argues for same-sex marriage as part of the basic human right to conscience and to respect for the dignity, moral agency, and moral independence of gay men and lesbians.<sup>373</sup> Such a right can be denied only on compelling grounds of public reason, not sectarian views. Analogizing to the basic denial of human rights to African Americans and women, he uses the compelling image of "moral slavery" to describe the harm inflicted upon gay men and lesbians by society's imposition of an "unjust cultural orthodoxy" concerning proper gender roles.<sup>374</sup> He argues for an interpretation of the Thirteenth Amendment that forbids such moral slavery of a whole class of persons on illegitimate grounds, and for an analogous interpretation of the Fourteenth Amendment that would lead to the protection of rights of conscience, intimate life, and the like for such persons.<sup>375</sup> Using the concept of the "paradox of intolerance," Richards argues that, throughout American history, society has imposed such an unjust orthodoxy (or what feminist scholars call "compulsory heterosexuality"<sup>376</sup>), reflecting sectarian views, precisely at the point at which debate about gender roles, sexuality, and such institutions as marriage is most needed.<sup>377</sup> Here Richards's analysis usefully builds upon scholarship calling into question the sort of reductive and

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<sup>372</sup> See *Baehr v. Lewin*, 852 P.2d 44, 61–63 (Haw. 1993) (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)); KOPPELMAN, *supra* note 370, at 153–58 (analogizing antimiscegenation laws to laws barring same-sex marriage). The Hawaii court concluded that Hawaii impermissibly denied same-sex couples the right to marry merely because of the sex of one member of the couple; i.e., if a woman had sought to marry a man, instead of a woman, she would have been permitted to do so. See *Baehr*, 852 P.2d at 59–67.

<sup>373</sup> See RICHARDS, *supra* note 9, at 357, 359–60.

<sup>374</sup> See *id.* at 352–53.

<sup>375</sup> See *id.* at 354; see also PEGGY DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 226–41 (1997) (drawing upon the Fourteenth Amendment's antislavery history to advance autonomy principle relating to rights of family that would support same-sex marriage).

<sup>376</sup> See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *POWERS OF DESIRE* 177 (Ann Snitow et al. eds., 1983).

<sup>377</sup> See RICHARDS, *supra* note 9, at 448–52, 459–66.

monolithic treatment of history and tradition concerning sexuality found in *Bowers* and suggesting a history of greater diversity of forms of intimate association and family.<sup>378</sup>

A toleration as respect model contends that allowing same-sex marriage recognizes the diversity among persons concerning their conceptions of the good and the intimate relationships they seek to secure.<sup>379</sup> At a minimum, permitting same-sex marriage accepts the fact of diversity and properly affords to gay men and lesbians the cultural resources to engage in the exercise of their moral powers. But doing so also allows room to move from the fact to the value of diversity. Recognizing the right to same-sex marriage allows for discourse and engagement among citizens about society's sexual practices and the meaning and goods of marriage. Gay rights and feminist scholars stress that such cultural transformation can extend to a critique of dominant orthodoxies about gender, family, and sexuality, and even to a reconceptualization of the existing institution of heterosexual marriage.<sup>380</sup> The examples of gay and

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<sup>378</sup> See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996).

<sup>379</sup> See Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 585-87 (1994-1995). One intra-community critique of the quest for same-sex marriage is that it is not a "path to liberation" for gay men and lesbians, but "runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships." Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *LESBIAN AND GAY MARRIAGE* 20, 21 (Suzanne Sherman ed., 1992). Privileging marriage above all other forms of gay and lesbian relationships would also thwart the goals of "providing true alternatives to marriage and of radically reordering society's view of family." *Id.* at 26. For similar arguments, see Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993). Here I do not seek to resolve this debate, but I should say that I do think that affording gay men and lesbians the right to marry is a vital step in achieving legal and social equality and respect, and is consistent with a commitment to diversity. It would allow the many gay men and lesbians who wish to marry as part of their life plan to do so, and open the door to cultural transformation of society's perception of gay and lesbian identity and of marriage itself. See Wolfson, *supra*, at 585-87.

<sup>380</sup> See RICHARDS, *supra* note 9, at 346-54 (drawing analogies between the transformative potential within abolitionist feminism and the historical struggle for gay and lesbian rights). Cf. Jane Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684 (1997) (book review) (observing that a theme in recent gay and lesbian work is the vital role of cultural transformation and the importance of reflecting gay and lesbian difference and diversity); Backer, *supra* note 18, at 788-802 (contending that the movement of gay men and lesbians beyond empty toleration depends upon their ability to enter "directly into the dialogue with the dominant society" and to take control of their image and identity).



lesbian marriages hold the potential "to expose and denaturalize the historical construction of gender at the heart of marriage" and to point to a new understanding of marriage not rooted in gender-based hierarchy and inequality empowering men over women.<sup>381</sup>

All of these theorists stressing cultural transformation hold out the prospect of moral evolution. The diversity rationale opens the door for movement along the spectrum of toleration toward respect and appreciation, yet does not require acceptance of difference as a positive good. The fundamental point is that protection of a realm of personal sovereignty is appropriate in the face of reasonable moral pluralism. And this may be a comparative advantage over more perfectionist models that require consensus as to the moral goods of same-sex marriage. Sandel may be right that it is difficult to secure public support for constitutional freedoms on the strength of the appeal to autonomy alone. Yet, to jettison autonomy arguments entirely, rather than to supplement them with arguments based on substantive moral goods, may prove an even more difficult strategy for securing such freedoms.<sup>382</sup> There is still tremendous resistance to extending toleration and full citizenship to gay men and lesbians and great ignorance and fear about their lives and practices.<sup>383</sup> In the face of such resistance, requiring that a right rest upon society's acceptance of the moral worth of homosexual intimate association—with no recourse to such principles as an entitlement to personal sovereignty or the appeal to the good of toleration in a diverse society—seems perilous and risks leaving gay men and lesbians without such rights. It also puts Sandel's analogical argument at risk of taking an inherently conservative path, so that rights are denied unless same-sex marriage is closely analogous to heterosexual marriage, which would

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<sup>381</sup> Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 17–18 (1991); Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 FORDHAM L. REV. 1313, 1329–34 (1997).

<sup>382</sup> As I have argued above, Sandel overstates the dichotomy in liberal toleration arguments between the good of choice and the good of what is chosen. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (linking the importance of choice in intimate association to the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality") (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)); RICHARDS, *supra* note 9, at 438–53 (invoking the basic right of all persons to intimate life and to bringing ethical convictions to bear on matters of love and care, of which the right to marry is an important institutional expression).

<sup>383</sup> See generally ALAN WOLFE, *ONE NATION, AFTER ALL* (1998) (reporting negative judgments and lack of tolerance of homosexuals in survey of otherwise tolerant suburban middle-class Americans).

emphasize sameness at the expense of recognition of diversity and of any notion of a distinctive and valuable gay and lesbian identity and culture.

## 2. *Problems of Recognizing and Securing Autonomy*

### a. *Problems of Perfectionism and Democratic Process: The Example of Internal Feminist Debates*

Another cluster of problems concerning the implementation of a perfectionist project concerns questions of process and legitimacy. In this Article, I focus on three strands of perfectionism—civic republican, feminist, and liberal—that share a commitment to the value of self-government as a useful proxy for living a good life. But even among these three, there is considerable divergence as to the role of autonomy in such a life and how government is to secure such autonomy. For example, Sandel focuses almost exclusively upon democratic self-government and appears to reject the liberal value of autonomy in the sense of personal self-government, or deliberative autonomy. But beyond these three strands of perfectionist thought, how is government to adjudicate between, on the one hand, those voices who espouse ideals of autonomy, self-determination, and agency and, on the other, those who reject the value of autonomy as a component of a good life and (as do some moral conservatives) instead espouse the ideal of being bound by the obligations of religious faith, virtue, and community?<sup>384</sup>

Second, how is government to secure autonomy? Is the goal autonomy as such, or autonomy only insofar as it allows the realization of morally worthy choices? For example, Raz regards autonomy as a central moral value that government has a responsibility to facilitate. As statements like “autonomy means that a good life is a life which is a free creation” suggest, the main content of his liberal perfectionist project appears to be autonomy as a proxy for a good life; yet he also argues that autonomy has value “only if it is directed at the good” and that autonomy to make worthless choices has no value that the government should protect.<sup>385</sup> Although he argues that respect for autonomy requires government to refrain from compulsion to deter those choices, some conservative perfectionists have drawn from Raz the idea that freedom should

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<sup>384</sup> See Bruce Frohnen, *Sandel's Liberal Self*, in *DEBATING DEMOCRACY'S DISCONTENT*, *supra* note 322 (arguing that Sandel, like liberals, has a model of the self that is hostile to those views of common good that look to God and tradition for norms and behavior).

<sup>385</sup> See RAZ, *supra* note 13, at 411–12. Discussion with Professor Frank Michelman was helpful on this point.

consist merely in the right to do right, or to make morally upright choices.<sup>386</sup>

Third, even assuming that there could be acceptance of the proposition that government should help persons live “meaningfully free and autonomous lives,” to what extent does government’s responsibility to foster autonomy require it to honor or reject citizens’ own views of what makes for a “meaningfully free and autonomous life”?<sup>387</sup> How is government to determine the preconditions for living such lives and whether particular ways of life are more or less free and autonomous—by the legislative process of investigation, factfinding, and the like? How is government to reconcile the competing views of what it means to live a “meaningfully free and autonomous life”—by majority vote? And what weight is to be given to moralistic arguments that certain conceptions of the good are unworthy and to paternalistic arguments that certain constituencies simply do not know their own best interests?

Certain debates within feminism over how best to interpret women’s experience and to promote women’s well-being may shed light on this problem. A vexing question within feminism is what it means to speak on behalf of women and how feminists may simultaneously honor the obligations to propose an agenda to advance the well-being of women and to listen to women. Of course, there are points of agreement among feminists and among women as to what makes women’s lives go well (e.g., protection against employment discrimination and violence and freedom from poverty); but on numerous substantive issues there are robust and contentious debates among feminists and among women (e.g., sexuality, pornography, motherhood and how to organize family and market labor, and the existence and import of differences between women and men).<sup>388</sup>

As feminist perfectionist Tracy Higgins suggests, this tension within feminism between the commitments to transforming or perfecting women’s lives through politics and to listening to women’s accounts of their experiences

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<sup>386</sup> See GEORGE, *supra* note 70, at 173–88 (critiquing tension in Raz as to the value of autonomy and challenging conclusion that it requires refraining from morals laws).

<sup>387</sup> See WEST, *supra* note 46, at 267.

<sup>388</sup> On the family, compare OKIN, *supra* note 54, at 170–86 (calling for a gender-neutral model of family in which mother and father do not have gender-specialized roles) with FINEMAN, *supra* note 237, at 226–36 (calling for a “re-visioning” of the family as a mother-child dyad and for state subsidies of mothers’ caretaking work). On the so-called “sex wars” among feminists, see ABRAMS, *supra* note 47. As the divisive pornography issue suggests, feminists also differ on when to enlist the tools of government to advance feminist goals and when is it better to battle on a cultural level. See Carlin Meyer, *Sex, Sin, and Women’s Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097 (1994).

and interests mirrors the tension between democracy and fundamental rights.<sup>389</sup> That is, both feminism and democracy must address the issue of dissent, whether from a feminist agenda (or orthodoxy) or from democratic outcomes that threaten core commitments to equality (and, I would add, liberty). Yet, understandably, feminism offers no easy resolution to this dilemma, because even a commitment to a deliberative model of politics does not guarantee consensus.<sup>390</sup> How would a perfectionist politics address this tension? Assuming perfectionists could find procedures to settle upon an agenda, what preconditions for democratic self-government would they insist upon to establish as legitimate the outcome of such procedures (even if they lose the battle)? Will there, for example, be a right of dissent and a role for toleration?

A further complication arises because feminists argue that sex inequality and systemic subordination have distorting effects on women's preference formation and choices.<sup>391</sup> This raises what we might call (borrowing from MacKinnon) the "difference versus dominance" problem.<sup>392</sup> It is inaccurate, some feminists charge, to speak of women's choices as the expression of their voice or their autonomy. Rather than taking women's preferences as given, or accepting the outcome of the democratic process, feminist perfectionists urge that government should address the underlying constraints on women's agency—posed by both private and public power—as well as take an active role in shaping women's preferences and social norms to help women overcome the effects of internalized oppression.<sup>393</sup> West, for example, advocates government's obligation to attack the damage wrought by "abusive social power and the damaging hierarchies of race, gender, and class,"<sup>394</sup> which undoubtedly would include the distorting effects on preferences and choices.

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<sup>389</sup> See Higgins, *supra* note 47, at 1686–87.

<sup>390</sup> See *id.* at 1686–89.

<sup>391</sup> See *supra* notes 52–58 and accompanying text. For additional feminist work recognizing the problem of sex inequality and subordination in shaping preferences, see, e.g., Okin, *supra* note 350, at 13–14; Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). The influential work of Amartya Sen addresses this problem in the context of developing or poorer countries. See AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985); Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61.

<sup>392</sup> See MACKINNON, *supra* note 53, at 32.

<sup>393</sup> See Higgins, *supra* note 47, at 1700. Moreover, feminists charge that the state already plays an active role in legitimating, suppressing, or redirecting women's preferences. See Rhode, *supra* note 49, at 1188–89.

<sup>394</sup> WEST, *supra* note 46, at 267.

Although prominent in radical feminist thought, the argument that subordination and inequality distort women's moral capacities, desires, and identity is not alien to liberal or liberal feminist thought.<sup>395</sup> Nor does a commitment to liberalism or liberal feminism preclude "group-based" solutions to attack gender hierarchy and its consequences and to foster self-development.<sup>396</sup> For example, liberal-republican constitutional scholar Cass Sunstein suggests that a constitutional democracy might override existing preferences when they may be nonautonomous (e.g., in cases of excessive limitations on opportunities or unjust background conditions) and that government should address obstacles posed to autonomy and well-being by certain social norms, social meanings, and social roles by taking action to change them.<sup>397</sup>

Arguably, the problem of the distorting effects of inequality and subordination upon the self points to the need for a perfectionist formative project to secure self-government, but it also raises worries that we may not know whether government is trampling upon autonomy or fulfilling it. Perfectionists who acknowledge that governmental "norm management" poses a threat to autonomy or agency and that rights should operate as a constraint on such a governmental role offer few details about how to deal with the threat.<sup>398</sup> For example, Sunstein argues that if women agree that the meaning of "being a woman" is bad for women and limits their exercise of autonomy, but individual women alone cannot change that meaning, government should attempt to do so.<sup>399</sup> But how, exactly, would this work when women conflict over what the meaning should be? Consider again the feminist critique of Rawls's political liberalism for tolerating households in which women and men have a

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<sup>395</sup> See JEAN GRIMSHAW, *PHILOSOPHY AND FEMINIST THINKING* 104–38 (1986); MILL, *supra* note 189, at 148–49, 172–73; Cynthia V. Ward, *The Radical Feminist Defense of Individualism*, 89 NW. U. L. REV. 871, 881–93 (1995); see also WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 91–94 (1989) (endorsing Okin's critique of Rawls and arguing that women and minorities have been unjustly excluded from the processes by which their identities and social roles were defined and that the solution is to empower women and minorities to be able to make their own definitions of their roles and identity).

<sup>396</sup> See Ward, *supra* note 395, at 893–99; see also *supra* text accompanying notes 329 & 350 for discussion of political liberalism's potential to embrace an anticaste or antisubordination principle with respect to women.

<sup>397</sup> See SUNSTEIN, *supra* note 141, at 163–94; Sunstein, *supra* note 5, at 908–10.

<sup>398</sup> See Sunstein, *supra* note 5, at 965–67 (stating that rights operate as constraints on norm management, but failing to offer "a full account of these limits"); see also Higgins, *supra* note 47, at 1700 (stating that the question of "how and under what circumstances" the state should exercise the "power to shape norms. . . has no easy answer").

<sup>399</sup> See Sunstein, *supra* note 5, at 963–65.

“voluntary” hierarchical division of authority and labor.<sup>400</sup> If women in such marriages testify as to their contentment with their family arrangements, how would these women’s voices count in formulating governmental policies concerning what would best foster such women’s capacity to live self-governing lives?

Feminist work suggests the complexity of the task of elaborating a conception of meaningful agency, or autonomy, and of what role government should play in its attainment. First, many feminists critique the dominance feminism exemplified by MacKinnon for collapsing female identity into victimhood and leaving no room for women to act as agents, albeit amidst constraints.<sup>401</sup> They point to the need for what Kathryn Abrams calls a model of “partial agency,” which acknowledges both women’s “capacity for self-direction and resistance” and “often-internalized patriarchal constraint.”<sup>402</sup> Second, postmodern feminists call into question the apparent feminist quest for unconstrained agency or for an autonomous self to the extent it fails to recognize that everyone is always acted upon and shaped by society, or by the process of social construction.<sup>403</sup> To such postmodernists, both the feminist quest for an authentic, nonsubordinated self and the liberal ideal of autonomy appear naive and even quaint.

As an initial matter, a toleration as respect model would counter this postmodernist critique with the observation that a liberal conception of autonomy does not require a model of the self as immune from the process of social construction.<sup>404</sup> Further, it would share the views of those feminists (such as Seyla Benhabib) who argue that a strong version of postmodernism, which includes the death of the idea of the autonomous, self-reflective subject, capable of acting on principles, “undermines the feminist commitment to women’s

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<sup>400</sup> See *supra* text accompanying note 330–42.

<sup>401</sup> See Abrams, *supra* note 47 (discussing a range of feminist critiques of dominance feminism); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (offering a critique of MacKinnon from a perspective of Black women’s experiences).

<sup>402</sup> See Abrams, *supra* note 47, at 346.

<sup>403</sup> For postmodern feminist work exploring the problem of locating women’s identity and agency within a social construction framework, see JUDITH BUTLER, *GENDER TROUBLE* (1990); *FEMINISM/POSTMODERNISM* (Linda J. Nicholson ed., 1990); Katherine Franke, *Cunning Stunts: From Hegemony to Desire*, 20 N.Y.U. REV. L. & SOC. CHANGE 549 (1993–1994) (reviewing MADONNA, *SEX* (1992)).

<sup>404</sup> For liberal work recognizing the formative role of institutions of civil society and the social and cultural environment, see, e.g., RAWLS, *supra* note 6, at 14; RAZ, *supra* note 13, at 308–20; Sunstein, *supra* note 5, at 908–29.

agency and sense of selfhood.”<sup>405</sup> Rather, as Benhabib argues, “the situated and gendered subject is heteronomously determined but still strives toward autonomy.”<sup>406</sup>

This debate within feminism complicates the perfectionist project of choosing among more or less “meaningfully autonomous” lives. It may, indeed, suggest the wisdom of a governmental program (akin to a feminist variant of political liberalism that would undergird toleration as respect) that would focus upon fostering autonomy by securing basic liberties and equal citizenship and providing resources to develop persons’ moral powers (or, as postmodernists might put it, engaging in self-construction), rather than upon taking sides among ways of life. Such a program could take into account the feminist claim that, while everyone is subject to the forces of social construction, “some groups of people systemically and structurally have more power to do the constructing than others”; therefore, freedom requires according material and cultural resources to groups with less power (such as women and racial and ethnic minorities) to enhance their ability to participate in the processes of self-construction.<sup>407</sup> Toleration as respect would not assume that preferences or choices are free or autonomous in the absence of the preconditions for deliberative democracy and deliberative autonomy. But with such preconditions in place, toleration as respect would support the use of norm management to a point (e.g., to foster support for the political value of women’s equal citizenship), but its respect for diversity and the exercise of moral powers would counsel caution concerning governmental steering or norm management concerning competing conceptions of good ways of life.

#### b. *Reconciling the Perfectionist Project with the Call to Move Beyond Empty Toleration*

Finally, a perfectionist politics potentially conflicts with the call to move beyond empty toleration to respect and to empathetic engagement with and appreciation of the other. Again, internal feminist debates are instructive. If the impulse to diagnose the distorting effects on the self due to domination raises the “difference versus dominance” problem, the feminist call for respect for the “other” raises the “difference versus deviance” problem. A central theme in much feminist work is appreciation of diversity and difference and a

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<sup>405</sup> BENHABIB, *supra* note 55, at 229.

<sup>406</sup> *Id.* at 214.

<sup>407</sup> See Hirschmann, *supra* note 52, at 59. Conversation with Professor Katherine Franke was helpful on this point.

commitment to listening to women and other “outsiders.” By listening to such perspectives, and by according them respect, if not special legitimacy or authority, feminists open the possibility of revising one’s perspective of persons or practices (regarded by society as marginal and deviant) in light of such persons’ voices.<sup>408</sup> As other critical scholarship elaborates the charge against empty toleration, when citizens are free merely to leave each other alone—rather than to engage with each other—there are psychic and other costs for minority groups, who often do not have an opportunity to inform and transform the dominant culture:

Insofar as the majority culture forms the background framework within which sense is made of public deliberations about the terms and conditions of political life and institutional arrangements, to be simply tolerated as the strange Other is not to have one’s culture and “horizons of significance” inform the constitution of public institutions and the development of public values. . . . To treat individuals with “equal respect” entails, at least partly, respecting their traditions and cultures, the forms of life which give depth and coherence to their identities. And to treat those forms of life with respect means to engage them, not simply to tolerate them as strange and alien. . . . To have reciprocal empathy is to first attempt to understand the Other, but there cannot be understanding the Other if one is not prepared to engage the Other in a dialogue.<sup>409</sup>

As this call for equal respect suggests, the possibility of transforming a person’s (and a culture’s) understanding of the moral worth of another person’s way of life is part of the promise of moving beyond empty toleration to respect. I contend that this possibility is part of the strength of the diversity rationale for toleration as respect, as the same-sex marriage example suggests. But when we take seriously the call for active engagement by citizens to understand each other, this opens the door for shifting or conflicting assessments of what it means to live a good life and complicates government’s perfectionist task of distinguishing between morally worthy and unworthy lives. For example, rather than citizens using government to discourage certain ways of life or social practices (e.g., committed same-sex relationships), perhaps they should instead

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<sup>408</sup> See Dailey, *supra* note 2, at 1283–85; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 9 (1989); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764–68 (1990); see also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

<sup>409</sup> Addis, *supra* note 18, at 121 (footnote omitted).



move in the direction of learning to respect and even appreciate those ways of life that differ from their own. It is instructive to recall Mill's argument for liberty on the rationale that society might benefit from "experiments of living."<sup>410</sup>

I do not mean to suggest that an agenda of respect for diversity allows no room for critical evaluation of lives for the distorting effects of inequality and subordination diagnosed by feminism. A toleration as respect model has a commitment to equal citizenship and to fostering the development and exercise of moral powers and the capacities for self-government, and must take seriously the problem of the impairment of such capacities. Respect and appreciation of diversity may be a less appropriate response to lives reflecting such impairment, due to external and internal constraints on agency, than a governmental attack on the sources of such impairment. The questions of interpretation and of appropriate governmental policy are complex. My point is that perfectionists who advocate governmental steering to foster self-government and recognize the value of pluralism need to provide a clearer picture of how a commitment to that value would inform their formative project.

I have highlighted the debate over same-sex marriage and internal feminist debates as a way to raise more general concerns about the perfectionist call to foster good lives through governmental steering in a morally pluralistic society. These concerns go to the battle over whose perfectionism wins, how government is to recognize and secure "meaningful" autonomy, and the tension between such perfectionist projects and the call to move beyond empty toleration to respect and appreciation. In light of these concerns, a toleration as respect model that takes the fact and value of diversity seriously would resist this dimension of perfectionism pending a clearer picture of how a perfectionist politics would address such concerns.

## VI. CONCLUSION

In this Article, I have argued for a model of toleration as respect. I have considered charges that toleration is both too empty and too robust and have shown that toleration as respect can meet these criticisms. Toleration as respect, rather than empty toleration, is the better interpretation of the import of three prominent rationales for toleration: the anti-compulsion rationale, the

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<sup>410</sup> MILL, *supra* note 8, at 54. Similarly, H.L.A. Hart held out the prospect, in a legal regime of toleration, that the example of persons whose lives, "like the lives of many homosexuals, are noble ones and in all other ways exemplary," would lead to the shifting of the limits of tolerance and, in effect, peaceful change in social norms. Hart, *supra* note 174, at 250-51.

jurisdictional rationale, and the diversity rationale. Toleration as respect aims at more than empty toleration, or pale civility, between citizens through appealing to such principles as respect for a realm of personal self-government and for diversity and through such requirements as mutual respect and reason-giving among citizens. Although toleration may be a disappointing virtue because it seems to hold back from a deeper social unity and cannot guarantee that citizens will move all the way to appreciation of each other, it plays a necessary and vital role in securing democratic and personal self-government in a morally pluralistic society.

Yet toleration as respect does not translate into the proposition that government leaving persons alone is sufficient to secure self-government. Notwithstanding perfectionist discontent with toleration, toleration as respect embraces the valuable perfectionist claim that government should undertake a formative project to foster the capacities necessary for citizens to live good, self-governing lives. In this Article, I have addressed a number of salient interpretative questions concerning the proper parameters of such a project, particularly as to the proper role of governmental persuasion. By way of illustration, I have offered a critique of abortion jurisprudence and the denial of the right to marry to gay men and lesbians from the vantage point of toleration as respect, suggesting a model of careful scrutiny of the reasons for which government acts and the effect of such action upon the capacity for self-government. Although such jurisprudence to date largely reflects empty toleration, at best, and intolerance, at worst, I have suggested that more recent cases such as *Planned Parenthood v. Casey* and *Romer v. Evans* show the potential to move toward a model of toleration as respect.

I have attempted to narrow the gap between perfectionism and toleration as respect by developing toleration as respect as a viable melding of key liberal and feminist principles concerning the primacy of autonomy (or agency) and respect for diversity. I have shown common ground as to government's formative project and suggested the strengths of toleration as respect where liberal and feminist perfectionism diverge from it.